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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

KELLY TOYS HOLDINGS, LLC;
JAZWARES, LLC; KELLY
AMUSEMENT HOLDINGS, LLC;
and JAZPLUS, LLC,

Plaintiffs,

vs.

BUILD-A-BEAR WORKSHOP,
INC.,

Defendant.

Case No. 2:24-cv-01169-JLS-MAR

**BUILD-A-BEAR WORKSHOP, INC.'S
REQUEST FOR JUDICIAL NOTICE
IN SUPPORT OF MOTION TO
DISMISS**

Date: May 10, 2024

Time: 10:30 a.m.

Place: Honorable Josephine L. Staton
Courtroom 8A

1 Pursuant to Rule 201 of the Federal Rules of Evidence, Defendant Build-A-
2 Bear Workshop, Inc. (“Build-A-Bear”) requests that the Court take judicial notice of,
3 or alternatively incorporates into Plaintiffs’ Complaint by reference, the following:

4 1. Images of Squishmallows taken from Plaintiffs’ public pleadings in
5 other lawsuits, as shown in **Exhibit A**;

6 2. The results of searches for the term “Squishmallows” on three major e-
7 commerce websites, Amazon.com (last accessed 3/3/2024) (**Exhibit B**),
8 Walmart.com (last accessed 3/3/2024) (**Exhibit C**), and Target.com (last accessed
9 3/3/2024) (**Exhibit D**);

10 3. The fact that Plaintiff Jazwares, LLC’s website, [www.jazwares.com/](http://www.jazwares.com/pages/squishmallows)
11 [pages/squishmallows](http://www.jazwares.com/pages/squishmallows), displays Squishmallows not shown in Plaintiff’s Complaint,
12 including images shown in Build-A-Bear’s current Motion to Dismiss;

13 4. The fact that non-party, Ty, Inc. currently markets and sells certain plush
14 toy products on its website at (<https://shop.ty.com/catalog/sab/?lang=en> and
15 <https://shop.ty.com/catalog/puffies/?lang=en>) (last accessed 3/3/2024), printouts of
16 which are attached hereto as **Exhibit E**;

17 5. The fact that non-party, Dan-Dee International Ltd. sold a certain plush
18 toy product through Wal-mart until at least as recent as December 21, 2023, as shown
19 in **Exhibit F** (last accessed 12/21/2023);

20 6. The fact that non-party Squishable.com has marketed certain plush toy
21 products since 2008 ([https://web.archive.org/web/20081205033257/](https://web.archive.org/web/20081205033257/http://www.squishable.com:80/)
22 <http://www.squishable.com:80/>), and currently markets certain plush toy products on
23 its website (https://www.squishable.com/category/Big_Animals.html) (last accessed
24 3/3/2024), attached hereto as **Exhibit G**;

25 7. The fact that non-party Kidrobot has marketed certain plush toy
26 products since 2015 ([https://web.archive.org/web/20150925074656/https://](https://web.archive.org/web/20150925074656/https://www.kidrobot.com/collections/yummy-world)
27 www.kidrobot.com/collections/yummy-world), and currently markets certain plush
28

toy products on its website (<https://www.kidrobot.com/collections/yummy-world>) (last accessed 3/3/2024), attached hereto as **Exhibit H**;

8. Pleadings in *Kellytoy USA, Inc., et al. v. Dan-Dee Int'l, Ltd., et al.*, Case No. 2:18-cv-05399 (C.D. Cal.) attached hereto as **Exhibit I**;

9. Pleadings in *Kellytoy Worldwide, Inc., et al. v. Ty, Inc., et al.*, Case No. 1:20-cv-00748 (N.D. Ill.) attached hereto as **Exhibit J**;

10. Pleadings in *Kellytoy Worldwide, Inc., et al. v. Zuru, LLC*, Case No. 2:23-cv-09255 (C.D. Cal.) attached hereto as **Exhibit K**;

11. Pleadings in *Kelly Toys Holdings, LLC, et al. v. Build-A-Bear Workshop, Inc.*, Case No. CACE-24-001221 (Florida 17th Cir. Ct.) attached hereto as **Exhibit L**;

12. Pleadings in *Kellytoy Worldwide, Inc. v. Hugfun International, Inc.*, Case No. CV-19-07652-MWF (C.D. Cal.) attached hereto as **Exhibit M**;

13. Pleadings in *Build-A-Bear Workshop, Inc. v. Kelly Toys Holdings, et al.*, Case No. 2:24-cv-00211 (E.D. Mo.) attached hereto as **Exhibit N**;

14. The facts that only Kellytoy Worldwide, Inc. is the registered Copyright Claimant of Copyright Number VA0002906026, and only Kelly Toys Holdings, LLC is the only Copyright Claimant for Copyright Number VA0002346938, according to the Copyright Office's Public Records Catalog, printouts of which are attached hereto as **Exhibit O**.

I. LEGAL STANDARD

Judicial notice under Federal Rule of Evidence 201 permits a court to notice an adjudicative fact if it is "not subject to reasonable dispute." Fed. R. Evid. 201(b). A fact is "not subject to reasonable dispute" if it is "generally known," or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(1)-(2). Facts subject to judicial notice may be considered on a motion to dismiss. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*,

1 551 U.S. 308, 322 (2007); *Mullis v. United States Bankruptcy Court*, 828 F.2d 1385,
2 1388 (9th Cir. 1987).

3 Additionally, “[i]f a document is not attached to a complaint, it may be
4 incorporated by reference ‘if the plaintiff refers extensively to the document or the
5 document forms the basis of the plaintiff’s claim.’” *Royal 4 Sys., Inc. v. RLI Ins. Co.*,
6 No. CV 22-05732-RSWLRAO, 2022 WL 19263327, at *3 (C.D. Cal. Dec. 9, 2022)
7 (quoting *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). “‘The doctrine
8 prevents plaintiffs from selecting only portions of documents that support their
9 claims, while omitting portions of those very documents that weaken—or doom—their
10 claims.’” *Clement 1 LLC v. Scottsdale Ins. Co.*, No. CV 23-3779 PA (JCX), 2023
11 WL 4492422, at *2 (C.D. Cal. July 11, 2023) (quoting *Khoja v. Orexigen*
12 *Therapeutics, Inc.*, 889 F.3d 988, 1002 (9th Cir. 2018)).

13 **II. ARGUMENT**

14 **A. Item Nos. 1 & 8 Through 13, Pleadings Filed in Other Judicial** 15 **Proceedings, Are Proper Subjects for Judicial Notice**

16 Public pleadings from prior lawsuits filed by Plaintiffs are the proper subject
17 of judicial notice. The Ninth Circuit has consistently held that district courts may
18 take judicial notice of pleadings filed in other courts. *See, e.g., Rosales-Martinez v.*
19 *Palmer*, 753 F.3d 890, 894 (9th Cir. 2014) (“[i]t is well established that we may take
20 judicial notice of judicial proceedings in other courts.”); *see also Reyn's Pasta Bella,*
21 *LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006) (taking judicial notice
22 of, *inter alia*, the plaintiff’s briefs from another case reasoning “[w]e may take
23 judicial notice of court filings and other matters of public record” because those
24 documents are “the proper subject of judicial notice”); *Wilkins v. VanDiver*, No.
25 820CV02417JLSDFM, 2022 WL 18229997 (C.D. Cal. Oct. 25, 2022) (quoting
26 *United States v. Black*, 482 F.3d 1035, 1041 (9th Cir. 2007)) (“Courts ‘may take
27 notice of proceedings in other courts, both within and without the federal judicial
28 system, if those proceedings have a direct relation to matters at issue.’”).

1 The referenced images of Plaintiffs' various Squishmallows products in
2 Exhibit A attached hereto, filed by Plaintiffs in prior lawsuits, are directly related to
3 Plaintiffs' claims against Build-A-Bear (indeed, the products form the basis of
4 Plaintiffs' claims), and the deficiencies of Plaintiffs' asserted trade dress definition
5 which are highlighted in Build-A-Bear's Motion to Dismiss. Plaintiffs did not merely
6 assert trade dress rights or trade dress infringement of certain specified
7 Squishmallows products within the entire Squishmallows line. Instead, Plaintiffs
8 invoked purported trade dress rights in the *entire* product line as part of their
9 Complaint, and images of other products from the line may be considered, especially
10 those that Plaintiffs have themselves asserted in other lawsuits to be representative
11 of the trade dress.

12 Furthermore, statements made by and photographs asserted by Plaintiffs in
13 other judicial proceedings concerning their purported rights in the Squishmallows are
14 readily verifiable, not subject to reasonable dispute, and are a matter of public record.
15 Plaintiffs not only defined the purported Squishmallows trade dress as that which is
16 shown in their asserted images, but Plaintiffs also presented several different trade
17 dress definitions throughout pleadings in other courts. Again, as stated with regard
18 to the images Plaintiffs asserted in other courts, Plaintiffs' asserted trade dress
19 definitions are directly related to the rights Plaintiffs claim to own, if any, and
20 Plaintiffs' ability to prove said rights.

21 The pleadings containing Plaintiffs' claimed trade dress definitions are a
22 matter of public record. Accordingly, the pleadings which contain images
23 purportedly displaying Plaintiffs' trade dress and Plaintiffs' claimed trade dress
24 definitions are properly subject to judicial notice. As discussed above, courts
25 routinely take judicial notice of pleadings filed in other courts. *E.g., Rosales-*
26 *Martinez*, 753 F.3d at 894.

B. Items 2 Through 7, The Fact That Additional Squishmallows and Previously Accused Products That Encompass Plaintiff's Asserted Trade Dress Exist

Items 2 and 3, the existence of numerous Squishmallows products online in the public marketplace at retailers such as Amazon (Exhibit B), Walmart (Exhibit C), and Target (Exhibit D) and on Plaintiff Jazwares, LLC's own website, that are not included in Plaintiffs' Complaint, are properly judicially noticeable. "It is common 'for courts to take judicial notice of factual information found on the world wide web.'" *Abundant Living Fam. Church v. Live Design, Inc.*, No. 5:22-cv-00140-RSWL-MRWx, 2022 WL 14708949, at *5 (C.D. Cal. Oct. 24, 2022) (internal quotations omitted); *see also Aguiar v. MySpace LLC*, No. CV-14-05520(SJO)(PJWX), 2017 WL 1856229, at *9 n.6 (C.D. Cal. May 5, 2017) (judicially noticing website screen shots).

The facts presented in Items 2 and 3 (Exhibits B through D and images in Build-A-Bear's Motion to Dismiss) are relevant to Build-A-Bear's argument that Plaintiffs' asserted definition of its trade dress (which Plaintiffs' assert is embodied within its Squishmallows product line) is insufficient where Plaintiffs' definition is overly broad and vague and in fact is not found in every product within the Squishmallows product line.

For similar reasons, Items 4 through 7, the existence of numerous products available in the public marketplace that Plaintiffs previously accused of infringing Plaintiffs' purported rights in the Squishmallows (Items 4 and 5) or exemplify a similar product design to that which Plaintiffs have asserted against Build-A-Bear (Items 6 and 7), are likewise the appropriate subject of judicial notice. *See MySpace LLC*, 2017 WL 1856229, at *9 n.6 (taking judicial notice of website screen shots); *see also Wible v. Aetna Life Ins. Co.*, 375 F. Supp. 2d 956, 966 (C.D. Cal. 2005) (taking judicial notice of Amazon webpage and non-party website). Items 3 through 6 are relevant to Build-A-Bear's argument that Plaintiffs' definition of its trade dress

1 is overly broad making it impossible to differentiate between stuffed animals that
2 would be deemed infringing and those that would not be, and Items 6 and 7 are also
3 relevant to Build-A-Bear's arguments that Plaintiffs were not the first entities to use
4 product design elements and features similar to those shown in the Squishmallows
5 product line, *i.e.*, an Asian style, Kawaii face. Specifically, Items 4 and 5 show that
6 Ty, Inc. and Dan-Dee International Ltd. continued to sell products that were
7 previously accused of trade dress infringement under the same foundation such
8 claims are now brought against Build-A-Bear, calling into question the strength of
9 Plaintiffs' rights, if any.

10 The facts presented in Items 1 through 7 – the existence of numerous other
11 Squishmallows products available on the public market, the existence of products
12 that Plaintiffs previously asserted infringe its purported rights in the Squishmallows,
13 and the existence of numerous products that were marketed and sold (before 2016)
14 and still are marketed and sold today embodying the same or similar product designs
15 to those shown in Plaintiffs' Squishmallows line – are readily verifiable by Plaintiffs
16 and are not subject to any reasonable dispute.

17 **C. Item 14, Copyright Catalog Print Outs**

18 Similar to Items 1 and 8 through 13, discussed in depth above (*see*
19 Section II.A.), it is proper for courts to take judicial notice of records at the United
20 States Copyright Office, namely printouts of the records for Copyright Numbers
21 VA0002906026 and VA0002346938. *Warren v. Fox Fam. Worldwide, Inc.*, 171 F.
22 Supp. 2d 1057, 1062 (C.D. Cal. 2001), *aff'd*, 328 F.3d 1136 (9th Cir. 2003) (taking
23 judicial notice of copyright registration certificates); *Fisher v. Nissel*, No. CV 21-
24 5839-CBM-(KSX), 2022 WL 16961479, at *4 (C.D. Cal. Aug. 15, 2022) (taking
25 judicial notice of printouts from the Copyright Office's Public Records Catalog);
26 *Evans v. NBCUniversal Media, LLC*, No. CV 21-0984-CBM-PD(X), 2021 WL
27 4513624, at *2 (C.D. Cal. July 23, 2021) (“[t]he Court grants Defendants’ request for
28 judicial notice as to the U.S. Copyright Office’s online Public Records Catalog”).

1 Plaintiffs' Complaint likewise asserted claims for copyright infringement,
2 specifically infringement of the works purportedly identified by Copyright Numbers
3 VA0002906026 and VA0002346938. The Copyright Office's Public Records
4 Catalog printouts of the aforementioned Copyright Numbers are therefore directly
5 relevant to Plaintiffs' claims and Build-A-Bear's Motion to Dismiss for lack of
6 standing grounds. Moreover, as the claimed owner of the asserted copyrighted works,
7 Plaintiffs are uniquely positioned to verify the information for which judicial notice
8 is requested in Item 14.

9 **D. Items 1 Through 3 and 8 Through 13 Are Properly Incorporated By**
10 **Reference to the Complaint**

11 Additionally, Items 1 through 3, and 8 through 13, may be properly noticed by
12 the Court in view of their incorporation by reference in Plaintiffs' Complaint.

13 **1. Items 1 through 3, Pleadings and Websites with Additional**
14 **Squishmallows**

15 First, with respect to Items 1 through 3, by asserting its trade dress definition
16 in the Complaint, which allegedly represents a common look across the entire
17 Squishmallows product line, but failing to include the entire line of Squishmallows
18 products, "plaintiffs [are] selecting only portions of [the Squishmallows products]
19 that support their claims, while omitting portions of those very [Squishmallows
20 products] that weaken—or doom—their claims.'" *Clement I LLC v. Scottsdale Ins. Co.*,
21 No. CV 23-3779 PA (JCX), 2023 WL 4492422, at *2 (C.D. Cal. July 11, 2023)
22 (quoting *Khoja v. Orexigen Therapeutics, Inc.*, 889 F.3d 988, 1002 (9th Cir. 2018)).
23 Moreover, Plaintiffs' asserted definition of its trade dress, which necessarily includes
24 the entire line of Squishmallows products, forms the basis of Plaintiffs' claim for
25 trade dress infringement. *Interactive Health LLC v. King Kong United States, Inc.*,
26 No. CV 06-1902-VBF(PLAx), 2008 U.S. Dist. LEXIS 126609, at *7 (C.D. Cal.
27 Mar. 6, 2008) ("when a plaintiff seeks protection for an entire line of products, the
28 plaintiff must demonstrate the trade dress signifies an overall look that is consistent

1 throughout the entire line.”).

2 Thus, under the incorporation by reference doctrine, Items 1 through 3, which
3 show additional Squishmallows products that Plaintiffs failed to reference in the
4 Complaint and which are apparently integral to Plaintiffs’ asserted trade dress
5 definition, should be incorporated by reference to the Complaint.

6 **III. CONCLUSION**

7 Based on the foregoing, Build-A-Bear Workshop, Inc. respectfully requests
8 that this Court dismiss Plaintiffs’ Complaint in its entirety, and award any further
9 relief to Defendant as this Court deems appropriate.

10
11
12
13 DATED: March 5, 2024

Respectfully submitted,

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EXHIBIT A

Kelly Toys Holdings, LLC et al. v. Build-A-Bear Workshop, Inc., 2:24-cv-01169 JLS (MARx) (C.D. Cal.) ECF No. 1 at 2, 4, 8, 10, 14, 18-19 (filed Feb. 12, 2024).







Kelly Toys Holdings, LLC et al. v. Zuru, LLC, 2:23-cv-09255 (C.D. Cal.) ECF
No. 1 at 2, 4, 8–10, 12–13, 16 (filed Nov. 2, 2023).





Kelly Toys Holdings, LLC v. www.axolotlsquishmallow.com., 1:23-cv-01382
(AKH) (S.D.N.Y.) ECF No. 6-1 at 1–4 (filed Mar. 6, 2023).



Kelly Toys Holdings LLC v. 19885566 Store, 1:22-cv-09384-JMF (S.D.N.Y.) ECF No. 6 at 11-13 (filed Dec. 12, 2022).



Kelly Toys Holdings, LLC v. Chang Sha Zhuo Qian Dian Zi Ke Ji You Xian Gong Si, 1:22-cv-03739 (JPO) (S.D.N.Y.) ECF No. 8 at 11-12 (filed May 31, 2022).



Kelly Toys Holdings, LLC v. Top Dep't Store, 1:22-cv-00558 (PAE) (S.D.N.Y.) ECF No. 6 at 8 (filed Feb. 2, 2022).



Kelly Toys Holdings, LLC v. Alialialill Store, 1:21-CV-08434 (AKH) (RWL) (S.D.N.Y.) ECF No. 8 at 11-13 (filed Nov. 15, 2021).



Kelly Toys Holdings, LLC v. www.Squishmallow-Official.Com, 1:21-cv-08431 (JPC) (S.D.N.Y.) ECF No. 5 at 10 (filed Oct. 27, 2021).



Kelly Toys Holdings, LLC v. Abderah-54, 21-cv-8433 (RA) (S.D.N.Y.) ECF No. 7 at 11 (filed Nov. 5, 2021).



Kelly Toys Holdings, LLC v. Airpods Pro Store, 1:21-cv-08435 (LJL) (S.D.N.Y.)
ECF No. 8 at 11, 13 (filed Mar. 16, 2022).



Kelly Toys Holdings, LLC v. Dongguan Yikang Plusei Toys Co., 1:21-CV-08111 (JGK)
(S.D.N.Y.) ECF No. 6 at 8 (filed Oct. 13, 2021).



Kelly Toys Holdings, LLC v. Baoding Mi Xiaomei Trading Co., Ltd., et al., 1:21-
cv-06029-LGS-SLC (S.D.N.Y.) ECF No. 5 at 12-13 (filed Sep. 13, 2021).



Kellytoy Worldwide, Inc. v. Idea Nuova, Inc. et al., 2:20-cv-02040-CBM-JPR (C.D. Cal.)
ECF No. 1-1 at 1 (filed Mar. 2, 2020).




Kellytoy Worldwide, Inc. et al v. TY, Inc. et al., 1:20-cv-00748 (N.D. Ill.) ECF No. 1-2 at 1-2 (filed Jan. 31, 2020).




Kellytoy Worldwide, Inc. v. Hugfun, International, Inc. et al., 2:19-cv-07652 (C.D. Cal.) ECF No. 1 at 28, 30–33 (filed Sep. 4, 2019).







Emma
\$14.99
[Get Emmal](#)




Small Baby Squad
[Get Small Baby Squad!](#)




Blake
\$14.99
[Get Blakel](#)




Mia
\$14.99
[Get Mial](#)




Addison
\$14.99
[Get Addison!](#)



Ava
\$14.99
[Get Aval](#)



Olive
\$14.99
[Get Olive!](#)



Harper
\$14.99
[Get Harper!](#)



Keychain Packs
\$9.99

Get Keychain Packs!



Small Baby Squad
Get Small Baby
Squad!



Small Squads
Get Small Squads!



Cameron "Cam"
\$14.99 - \$24.99

Get Cameron "Cam"!



Fifi
\$14.99 - \$24.99

Get Fifi!



Hans
\$14.99 - \$24.99

Get Hans!



Ace
\$14.99 - \$24.99

Get Ace!



Astrid
\$14.99 - \$24.99

Get Astrid!



Stanley
\$14.99 - \$24.99

Get Stanley!



Connor
\$14.99 - \$24.99

Get Connor!



Simon
\$14.99 - \$24.99

Get Simon!



Tim
\$14.99 - \$24.99

Get Tim!



Jim

\$14.99 – \$24.99

Get Jim!



Peter

\$14.99 – \$24.99

Get Peter!



Hoot

\$14.99 – \$24.99

Get Hoot!



Holly

\$14.99 – \$24.99

Get Holly!



Puff

\$14.99 – \$24.99

Get Puff!



Piper

\$14.99 – \$24.99

Get Piper!



Sam

\$14.99 – \$24.99

Get Sam!



Wendy

\$14.99 – \$24.99

Get Wendy!



James

\$14.99 – \$24.99

Get James!



Milly

\$14.99 – \$24.99

Get Milly!



Bop

\$14.99

Get Bop!



Bubbles

\$14.99

Get Bubbles!



Buttons

\$14.99

Get Buttons!



Charlotte

\$14.99

Get Charlottel



Chuck

\$14.99

Get Chuck!



Sophie

\$14.99

Get Sophie!



Addison

\$14.99

Get Addison!



Ava

\$14.99

Get Ava!



Blake

\$14.99

Get Blake!



Emma

\$14.99

Get Emmal



Harper

\$14.99

Get Harper!



Jaxton

\$14.99

Get Jaxton!



Liam

\$14.99

Get Liam!



Mia

\$14.99

Get Mia!



Olive

\$14.99

Get Olive!



Small Baby Squad

Get Small Baby Squad!

EXHIBIT B

Delivering to St Louis 63150
Update location

All ▾

squishmallows

EN ▾

Hello, sign in
Account & Lists ▾

Returns
& Orders

0

All Medical Care ▾ Groceries ▾ Best Sellers Amazon Basics Prime ▾ New Releases Customer Service Music Shop women-owned businesses

1-48 of over 10,000 results for "squishmallows"

Sort by: Featured

Eligible for Free Shipping

Free Shipping by Amazon
Get FREE Shipping on eligible orders shipped by Amazon

More-sustainable Products

Climate Pledge Friendly

Department

Toys & Games
Stuffed Animals & Teddy Bears
Kids' Plush Toy Pillows
Plush Figure Toys
Arts & Crafts Supplies
Home & Kitchen

Customer Review

& Up
& Up
& Up
& Up

Toy Character

Stitch
Harry Potter
Pokemon
Sonic the Hedgehog
Eeyore
Nightmare Before Christmas
Lilo
[See more](#)

Brands

Squishmallows
TeeTurtle
Squishville
AIXINI
Niuniu Daddy
Mewaii
Auspicious beginning
[See more](#)

Toy & Game Price

Under \$25
\$25 to \$50
\$50 to \$100
\$100 to \$200
\$200 & Above

\$ Min

\$ Max

Go

Deals & Discounts

All Discounts
Today's Deals

Toys Age Range

Birth to 24 Months
2 to 4 Years
5 to 7 Years
8 to 13 Years
14 Years & Up

Material

Plastic
Silicone
Vinyl



Squish, Collect and Squad Up with Squishmallows

[Shop Squishmallows >](#)



Squishmallows Original
14-Inch Fritz Green
1

Squishmallows Original
8-Inch Empressa Pink
2

Squishmallows Original
12-Inch Elea Grey
1

Sponsored

Results



Sponsored

Squishmallows Original 14-Inch
Fritz Green Frog with Easter Print
Belly - Official Jazwares Large
Plush

1

300+ bought in past month

\$19⁹⁹

FREE delivery **Fri, Mar 8** on \$35 of
items shipped by Amazon
Or fastest delivery **Wed, Mar 6**
Ages: 3 years and up

Overall Pick



Squishmallows Official Kellytoy
8" Plush Mystery Pack - Styles
Will Vary in Surprise Box That
Includes Three 8" Plush

7,121

5K+ bought in past month

\$22⁹⁹

FREE delivery **Fri, Mar 8** on \$35 of
items shipped by Amazon
Or fastest delivery **Wed, Mar 6**
Ages: 3 years and up



Squishmallows Original 12-Inch
Borsa Spotted Highland Cow -
Medium-Sized Ultrasoft Official
Jazwares Plush

519

10K+ bought in past month

\$15⁹⁹ Typical: \$56.99

FREE delivery on \$35 shipped by
Amazon.
Ages: 3 years and up



[+2 colors/patterns](#)



- Acrylic
- Cotton
- Nylon
- Polycarbonate
- See more
- Toy Figure Theme
 - Anime
 - Comic
 - Fantasy
 - Horror
 - Military
 - Movie
 - Sports
- See more
- Toy Figure Occasion
 - Baby Shower
 - Bridal Shower
 - Christmas
 - Easter
 - Engagement
 - Halloween
 - Hanukkah
- See more
- Toy Animal Type
 - Bears
 - Birds
 - Bunnies & Rabbits
 - Cats
 - Dinosaurs
 - Dogs
 - Elephants
 - Fish & Sea Life
 - Frogs & Amphibians
 - Giraffes
 - Horses & Ponies
 - Kangaroos
 - Koalas
 - Lions & Big Cats
 - Monkeys & Apes
 - Snakes, Turtles & Reptiles
 - Zebras

Stuffed Animals & Plush Toys Size

- 4.9 Inches & Under
- 5 to 6.9 Inches
- 7 to 9.9 Inches
- 10 to 14.9 Inches
- 15 to 19.9 Inches
- 20 Inches & Above

Business Type

- Small Business

Animal Theme

- Bear
- Bird
- Bull
- Butterfly
- Cat
- Caterpillar
- Cheetah

See more

Toy Figure Special Features

- Light
- Sound

All Top Brands

- Top Brands

International Shipping

- International Shipping Eligible

Squishmallows Original 14-Inch Lyla Vanilla Birthday Cake with Rainbow Sprinkles Embroidery - Official Jazwares Large Plush

27

2K+ bought in past month

\$19⁹⁹

FREE delivery **Fri, Mar 8** on \$35 of items shipped by Amazon
Or fastest delivery **Wed, Mar 6**

Squishmallows Original 8-Inch Reina Green Butterfly with Flower Crown - Official Jazwares Large Plush

27

5K+ bought in past month

\$12⁹⁹

FREE delivery **Fri, Mar 8** on \$35 of items shipped by Amazon
Or fastest delivery **Wed, Mar 6**

Squishmallows Official Kellytoy Plush 12" Maui The Pineapple - Ultrasoft Stuffed Animal Plush Toy

5,034

2K+ bought in past month

\$15⁹⁹ List: \$22.99

FREE delivery **Fri, Mar 8** on \$35 of items shipped by Amazon
Or fastest delivery **Wed, Mar 6**

Trending now

Sponsored



KMUYSL Unicorn Toys for Girls Ages 3 4 5 6 7 8+ Year - Unicorn Mommy Stuffed Animal with 4 Baby Unicorns in Her Tummy,...

1,442

1K+ bought in past month

\$29⁹⁹ List: \$45.99

Join Prime to buy this item at \$26.99



+24 colors/patterns

Auspicious beginning Shiba Inu Plush-19.6" Corgi Plush Dog Plushies Stuffed Animal, Plushie Toy Anime Kawaii Plush Soft...

16,542

300+ bought in past month

\$20⁹⁹ List: \$24.99

Save 10% with coupon



19.7" Shiba Inu Plush, Soft Corgi Plushies Adorable Throw Pillow, Cute Puppy Anime Dog Stuffed Animals Gifts for Girls Boys Kids...

115

50+ bought in past month

\$17⁹⁹ List: \$21.99

More results



Squishmallows Original 14-Inch Peony Unicorn Pancakes with Whipped Cream - Official Jazwares Large Plush

7

1K+ bought in past month

\$19⁹⁹

FREE delivery **Fri, Mar 8** on \$35 of items shipped by Amazon
Or fastest delivery **Tue, Mar 5**



Squishmallows 12-Inch Daxxon Purple Alien - Medium-Sized Ultrasoft Official Kelly Toy Plush

486

2K+ bought in past month

\$15⁹⁹

FREE delivery **Fri, Mar 8** on \$35 of items shipped by Amazon
Or fastest delivery **Wed, Mar 6**
Ages: 3 years and up



Squishmallows 5 Inch (Pack of 10) Plush - Diane Bigfoot, Giles Grasshopper, Maritza Cactus, Nico Axolotl, Rachel Mushroom,...

591

5K+ bought in past month

\$37⁵⁵ List: \$44.99

FREE delivery **Fri, Mar 8**
Or fastest delivery **Wed, Mar 6**

Seller

Wonderful World Collectibles, LLC
Amazon.com
Rare & Cute Collection
Deblieux
GameHavenNC
Barbi's Bargains
Woohooo LLC

Availability

Include Out of Stock

Ages: 3 years and up

New Arrival Pick



Squishmallows Original 16-Inch
Ada Cream Cow with Green Floral
Print Spots - Official Jazwares
Large Plush

22

1K+ bought in past month

\$24⁹⁹

FREE delivery **Fri, Mar 8** on \$35 of
items shipped by Amazon
Or fastest delivery **Tue, Mar 5**
Ages: 3 years and up



Sponsored

Claw Machine for Kids, Mini
Vending Machines Candy Grabber
Prize Dispenser Toys for
Girls, Electronic Arcade Claw...

543

900+ bought in past month

Limited time deal

\$39⁹⁹ List: \$69.99

FREE delivery **Fri, Mar 8**
Or fastest delivery **Wed, Mar 6**
Ages: 36 months - 20 years

More Buying Choices
\$34.95 (7 used & new offers)



Sponsored

Mini Claw Machine for Kids,
Arcade Games for Home, Large
Candy Claw Machine with Toys
Inside, Vending Machines Toys, ...

28

50+ bought in past month

\$28⁹⁹ List: \$34.99

Save 10% with coupon

FREE delivery **Fri, Mar 8** on \$35 of
items shipped by Amazon
Or fastest delivery **Wed, Mar 6**
Ages: 36 months - 18 years

Shop now

Sponsored



+13 colors/patterns

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Plush Toy - Great Gift for Kids

2,210

200+ bought in past month

\$19⁹⁹

Save 3% at checkout

FREE delivery **Fri, Mar 8** on \$35 of
items shipped by Amazon
Or fastest delivery **Wed, Mar 6**
Ages: 36 months - 3 years



Sponsored

Butter Slime Kit Two-Toned 11
Packed Fidget Toy, Educational
Slime Toys, Birthday Gifts Prize
Party Favors for Girl Boys Kids 6...

329

1K+ bought in past month

\$11⁹⁹ List: \$20.99

FREE delivery **Fri, Mar 8** on \$35 of
items shipped by Amazon
Or fastest delivery **Wed, Mar 6**
Ages: 3 years and up



+4 colors/patterns

Squishmallows Original 14-Inch
Cam Calico Cat - Large Ultrasoft
Official Jazwares Plush

3,395

2K+ bought in past month

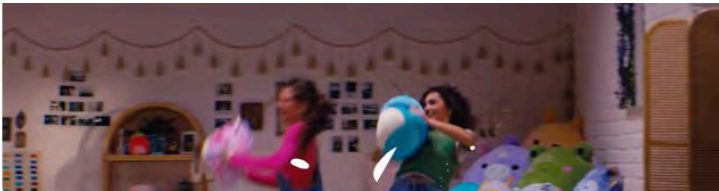
\$19⁹⁹

FREE delivery **Fri, Mar 8** on \$35 of
items shipped by Amazon
Or fastest delivery **Tue, Mar 5**
Ages: 3 years and up



Sponsored

#157



Squishmallows Original
Disney 14-Inch Simba Plush -
Large Ultrasoft Official...

200+ bought in past month

\$24⁹⁹

FREE delivery **Fri, Mar 8** on \$35 of items

More results



Squishmallows Original 5-Inch
Scented Mystery Plush - Little
Ultrasoft Official Jazwares Plush

706

600+ bought in past month

\$8⁹⁹ List: \$10.99

FREE delivery **Fri, Mar 8** on \$35 of
items shipped by Amazon
Or fastest delivery **Wed, Mar 6**
Ages: 3 years and up



Squishmallows Original 12-Inch
Willoughby Sage Green Possum -
Medium-Sized Ultrasoft Official
Jazwares Plush

297

1K+ bought in past month

\$15⁹⁹ Typical: \$34.99

FREE delivery **Fri, Mar 8** on \$35 of
items shipped by Amazon
Or fastest delivery **Wed, Mar 6**
Ages: 3 years and up



Squishmallows Original 14-Inch
Sunshine Rainbow with Clouds -
Large Ultrasoft Official Jazwares
Plush

1,454

2K+ bought in past month

\$19⁹⁹

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\$17.42 (9 used & new offers)
Ages: 3 years and up



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Squishmallows 10" Gigi The Cat
Plush - Official Kellytoy 2024 -
Collectible Soft Squishy Kitty
Stuffed Animal Toy - Add to Yo...

17

1K+ bought in past month

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Ages: 36 months - 8 years



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Ages: 3 years and up



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Squishmallows Original 12-Inch
Elea Grey Lamb with Pink Floral
Belly - Official Jazwares Plush

1

300+ bought in past month

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Ages: 3 years and up

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16,542

300+ bought in past month

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Save 10% with coupon

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[+8 colors/patterns](#)

Squishmallows Disney Original 10-Inch Stitch HugMees - Medium-Sized Ultrasoft Official Jazwares Plush

424

3K+ bought in past month

\$14⁹⁹

FREE delivery **Fri, Mar 8** on \$35 of items shipped by Amazon
Or fastest delivery **Wed, Mar 6**

Ages: 3 years and up



Squishmallows Original 8-Inch Pierogi Banana Monkey - Official Jazwares Plush


13

2K+ bought in past month

\$12⁹⁹

FREE delivery **Fri, Mar 8** on \$35 of items shipped by Amazon
Or fastest delivery **Wed, Mar 6**

Ages: 3 years and up



Squishmallows Stackables Original 12-Inch Truman Blue Leatherback Turtle - Ultrasoft Official Jazwares Plush

30

1K+ bought in past month

\$19⁹⁹

FREE delivery **Fri, Mar 8** on \$35 of items shipped by Amazon
Or fastest delivery **Wed, Mar 6**

Ages: 3 years and up



Squishmallows Original 5-Inch Mitchard Kiwi Bear - Official Jazwares Plush


2

1K+ bought in past month

\$9⁹⁹

FREE delivery **Fri, Mar 8** on \$35 of items shipped by Amazon
Or fastest delivery **Wed, Mar 6**

Ages: 3 years and up



[+2 colors/patterns](#)

Sponsored

Shiba Inu Dog Plush Pillow, Corgi Stuffed Animal Plush Toy Hug Pillow Gifts for Girl Boy (Brown, 11.8in)

782

50+ bought in past month

\$16⁹⁹ Typical: \$18.99

Save 10% with coupon

FREE delivery **Fri, Mar 8** on \$35 of items shipped by Amazon
Or fastest delivery **Wed, Mar 6**

Ages: 3 years and up

#159



Sponsored

LUV HER Squishmallow Girls Add A Charm Box Set with 1 Charm Bracelet & 5 Interchangeable Charms - Ages 3+

72



Sponsored

KMUYSL Cat Plush Toy Birthday Kitty Plush Pillow, Soft Cute Birthday Stuffed Animal Cat Plushies Pillow Home Room...

14



Squishmallows 14-Inch Light Brown Otter with Fuzzy Ears Plush - Add RIE to Your Squad, Ultrasoft Stuffed Animal Large...

932

2K+ bought in past month



Squishmallows Original 12-Inch Charles Pickle with Mustache - Medium-Sized Ultrasoft Official Jazwares Plush

379

2K+ bought in past month

\$30⁸⁹

FREE delivery **Fri, Mar 8** on \$35 of items shipped by Amazon
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More Buying Choices
\$29.95 (13 used & new offers)

Ages: 3 years and up



Squishmallows Flip-A-Mallows 12-Inch Mint Ice Cream and Toasted Cinnamon Roll Plush - Add Maya and Chanel to Your...

232

500+ bought in past month

\$19⁹⁹ Typical: \$39.99

FREE delivery **Fri, Mar 8** on \$35 of items shipped by Amazon
Or fastest delivery **Wed, Mar 6**

More Buying Choices
\$15.73 (7 used & new offers)

Ages: 3 years and up



Squishmallows 14-Inch Pace Tan Fennec Fox - Large Ultrasoft Official Kelly Toy Plush

430

1K+ bought in past month

\$19⁹⁹

FREE delivery **Fri, Mar 8** on \$35 of items shipped by Amazon
Or fastest delivery **Wed, Mar 6**
Ages: 3 years and up



+2 colors/patterns

Squishmallows 10-Inch Bubbles The Purple Bunny Easter Plush - Official Jazwares- Collectible Cute Soft & Squishy Bunny...

10

1K+ bought in past month



Squishmallows 5" Mystery Box Plush 5 Pack - New 2024 Assortment - Various Styles - Official Kellytoy - Collectible So...

2,366

4K+ bought in past month

\$34⁹⁹ Typical: \$39.99









Squishmallows Original 14-Inch Reshma Light Pink Cow with Purple Bandana - Large Ultrasoft Official Jazwares Plush










2,943







1K+ bought in past month

\$19⁹⁹

<p>\$27⁹⁹</p> <p>FREE delivery Fri, Mar 7 - 11 Or fastest delivery Mar 6 - 7</p> <p>More Buying Choices \$24.99 (2 new offers)</p> <p>Ages: 36 months - 8 years</p>  <p>Squishmallows Original 14-Inch Andreina Pink Monarch Butterfly with White Sparkle Belly - Large Ultrasoft Official Jazwares Plush</p> <p>1,184</p> <p>1K+ bought in past month</p> <p>\$19⁹⁹</p> <p>FREE delivery Fri, Mar 8 on \$35 of items shipped by Amazon Or fastest delivery Wed, Mar 6</p> <p>Ages: 3 years and up</p>	<p>FREE delivery Fri, Mar 8 on \$35 of items shipped by Amazon Or fastest delivery Wed, Mar 6</p> <p>More Buying Choices \$30.78 (4 used & new offers)</p> <p>Ages: 24 months and up</p>  <p>Squishmallows Original 14-Inch Perry Teal Dolphin with Red Surfboard - Official Jazwares Large Plush</p> <p>10</p> <p>1K+ bought in past month</p> <p>\$19⁹⁹</p> <p>FREE delivery Fri, Mar 8 on \$35 of items shipped by Amazon Or fastest delivery Wed, Mar 6</p> <p>Ages: 3 years and up</p>	<p>FREE delivery Fri, Mar 8 on \$35 of items shipped by Amazon Or fastest delivery Wed, Mar 6</p> <p>More Buying Choices \$19.19 (14 used & new offers)</p> <p>Ages: 3 years and up</p>  <p>Squishville by Original Squishmallows Purple Pals Squad Plush - Six 2-Inch Squishmallows Plush Including Bashira, Mollie,...</p> <p>+4 colors/patterns</p> <p>646</p> <p>200+ bought in past month</p> <p>\$16⁹⁹ List: \$17.99</p> <p>FREE delivery Fri, Mar 8 on \$35 of items shipped by Amazon Or fastest delivery Wed, Mar 6</p> <p>More Buying Choices \$12.99 (17 new offers)</p> <p>Ages: 3 years and up</p>
 <p>Squishmallows Original 8-Inch Maudi Marbled Blueberry Cupcake with Blue Wrapper - Official Jazwares Plush</p> <p>3</p> <p>700+ bought in past month</p> <p>\$12⁹⁹</p> <p>FREE delivery Fri, Mar 8 on \$35 of items shipped by Amazon Or fastest delivery Wed, Mar 6</p> <p>Ages: 3 years and up</p>	 <p>Squishmallows 16-Inch Rosie Spotted Pig with Yellow Flower Crown - Large Ultrasoft Official Kelly Toy Plush - Amazon...</p> <p>467</p> <p>1K+ bought in past month</p> <p>\$24⁹⁹</p> <p>FREE delivery Fri, Mar 8 on \$35 of items shipped by Amazon Or fastest delivery Wed, Mar 6</p> <p>More Buying Choices \$22.18 (7 used & new offers)</p> <p>Ages: 3 years and up</p>	 <p>Squishmallows Original 14-Inch Rutabaga Caterpillar with Multicolored Stripes - Large Ultrasoft Official Jazwares Plush</p> <p>775</p> <p>600+ bought in past month</p> <p>\$19⁹⁹</p> <p>FREE delivery Fri, Mar 8 on \$35 of items shipped by Amazon Or fastest delivery Wed, Mar 6</p> <p>More Buying Choices \$17.17 (8 used & new offers)</p> <p>Ages: 3 years and up</p>

#161

		
<p>Squishmallows Original 14-Inch Scarlito Purple Barn Owl - Large Ultrasoft Official Jazwares Plush</p> <p>219</p> <p>600+ bought in past month</p> <p>\$19⁹⁹</p> <p>FREE delivery Fri, Mar 8 on \$35 of items shipped by Amazon Or fastest delivery Wed, Mar 6</p> <p>More Buying Choices</p>	<p>Squishmallows Original 12-Inch Michaela Rainbow Leopard with Pink Bandana - Official Jazwares Plush</p> <p>25</p> <p>1K+ bought in past month</p> <p>\$16⁹⁹</p> <p>FREE delivery Fri, Mar 8 on \$35 of items shipped by Amazon Or fastest delivery Wed, Mar 6</p>	<p>Squishmallows Original 16-Inch Malcolm Mushroom - Official Jazwares Large Plush</p> <p>9</p> <p>1K+ bought in past month</p> <p>\$24⁵⁰</p> <p>FREE delivery Fri, Mar 8 Or fastest delivery Mar 5 - 6 Only 1 left in stock - order soon.</p> <p>Ages: 3 years and up</p>
		
<p>Squishmallows Original 5-Inch Plush 10-Pack - Gigi Tabby Cat, Dolan Dino, Brina Bigfoot, Maui Pineapple, Amal Moth, and Mor...</p> <p>8</p> <p>700+ bought in past month</p> <p>\$44⁹⁹</p> <p>FREE delivery Fri, Mar 8 Or fastest delivery Wed, Mar 6</p> <p>More Buying Choices \$41.89 (5 used & new offers)</p> <p>Ages: 3 years and up</p>	<p>Squishmallows 12-Inch Aldous Teal and Black Fruit Bat - Medium-Sized Ultrasoft Official Kelly Toy Plush</p> <p>872</p> <p>1K+ bought in past month</p> <p>\$15⁹⁹</p> <p>FREE delivery Fri, Mar 8 on \$35 of items shipped by Amazon Or fastest delivery Wed, Mar 6</p> <p>More Buying Choices \$10.50 (23 new offers)</p> <p>Ages: 3 years and up</p>	<p>Squishmallows Original 12-Inch Ludwig Teal Frog with Mint Green Belly - Medium-Sized Ultrasoft Official Jazwares Plush</p> <p>1,335</p> <p>1K+ bought in past month</p> <p>\$15⁹⁹ Typical: \$26.94</p> <p>FREE delivery Fri, Mar 8 on \$35 of items shipped by Amazon Or fastest delivery Wed, Mar 6</p> <p>More Buying Choices \$12.44 (6 used & new offers)</p> <p>Ages: 3 years and up</p>
		
	<p>Squishmallows Original 14-Inch Afiyah Pink Pot Succulent - Large Ultrasoft Official Jazwares Plush</p>	

<p>Squishmallows Original 16-Inch Woodward Snowshoe Cat with Fuzzy Belly - Official Jazwares Large Plush</p> <p>15</p> <p>800+ bought in past month</p> <p>\$24⁹⁹</p> <p>FREE delivery Fri, Mar 8 on \$35 of items shipped by Amazon Or fastest delivery Tue, Mar 5</p>	<p>700</p> <p>300+ bought in past month</p> <p>\$19⁹⁹</p> <p>FREE delivery Fri, Mar 8 on \$35 of items shipped by Amazon Or fastest delivery Wed, Mar 6</p> <p>More Buying Choices \$14.99 (6 used & new offers)</p> <p>Ages: 3 years and up</p>	<p>Squishmallows Original 16-Inch Andres Brown Sheltie with Hearts Headband - Official Jazwares Large Plush</p> <p>4</p> <p>1K+ bought in past month</p> <p>\$24⁹⁹</p> <p>FREE delivery Fri, Mar 8 on \$35 of items shipped by Amazon Or fastest delivery Tue, Mar 5</p>
 <p>Squishmallows Original 12-Inch Enid Neon Yellow Mushroom - Medium-Sized Ultrasoft Official Jazwares Plush</p> <p>206</p> <p>1K+ bought in past month</p> <p>\$12¹⁷ List: \$15.99</p> <p>FREE delivery Fri, Mar 8 on \$35 of items shipped by Amazon Or fastest delivery Wed, Mar 6</p> <p>Ages: 3 years and up</p>	 <p>Squishmallows Original 14-Inch Sachie Grey Striped Whale Shark with White Belly - Large Ultrasoft Official Jazwares Plush</p> <p>783</p> <p>1K+ bought in past month</p> <p>\$19⁹⁹</p> <p>FREE delivery Fri, Mar 8 on \$35 of items shipped by Amazon Or fastest delivery Wed, Mar 6</p> <p>More Buying Choices \$18.90 (6 used & new offers)</p> <p>Ages: 3 years and up</p>	 <p>Squishmallows 12-Inch Fancy Octopus - Add Zobey to Your Squad, Ultrasoft Stuffed Animal Medium-Sized Plush Toy, Official...</p> <p>1,840</p> <p>800+ bought in past month</p> <p>\$15⁹⁹</p> <p>FREE delivery Fri, Mar 8 on \$35 of items shipped by Amazon Or fastest delivery Wed, Mar 6</p> <p>More Buying Choices \$14.72 (32 used & new offers)</p> <p>Ages: 3 years and up</p>
 <p>Squishmallows Official Kellytoy Plush 16" Austin The Avocado - Ultrasoft Stuffed Veggie Toy</p> <p>4,045</p> <p>1K+ bought in past month</p> <p>\$24⁹⁹</p> <p>FREE delivery Fri, Mar 8 on \$35 of items shipped by Amazon</p> <p>More Buying Choices \$23.99 (8 used & new offers)</p> <p>Ages: 3 years and up</p>	 <p>Squishmallows 20-Inch Diane Peach Bigfoot with Rainbow Hair - Jumbo Ultrasoft Official Kelly Toy Plush - Amazon Exclusive</p> <p>495</p> <p>700+ bought in past month</p> <p>\$39⁹⁹</p> <p>FREE delivery Fri, Mar 8 Or fastest delivery Thu, Mar 7</p> <p>More Buying Choices \$37.05 (7 used & new offers)</p> <p>Ages: 3 years and up</p>	 <p>Squishmallows Original 12-Inch Rayen Pancake 3-Stack with Butter Flower - Medium-Sized Ultrasoft Official Jazwares Plush</p> <p>1,879</p> <p>700+ bought in past month</p> <p>\$15⁹⁹</p> <p>FREE delivery Mon, Mar 11 on \$35 of items shipped by Amazon Or fastest delivery Wed, Mar 6</p> <p>Only 9 left in stock (more on the way).</p> <p>More Buying Choices \$13.83 (15 used & new offers)</p>

#163

Ages: 3 years and up



Squishmallows Original 3.5-Inch Clip-On Plush 5-Pack - Ultrasoft Official Jazwares Plush - Amazon Exclusive

176

1K+ bought in past month

\$19⁹⁹

FREE delivery **Fri, Mar 8** on \$35 of items shipped by Amazon
Or fastest delivery **Wed, Mar 6**

More Buying Choices
\$19.79 (3 used & new offers)
Ages: 3 years and up



Squishmallows Original Harry Potter 10-Inch Gryffindor Lion Plush - Medium-Sized Ultrasoft Official Jazwares Plush

1,233

3K+ bought in past month

\$15⁹⁹

FREE delivery **Fri, Mar 8** on \$35 of items shipped by Amazon
Or fastest delivery **Wed, Mar 6**

Ages: 3 years and up



[+2 colors/patterns](#)

Squishmallows Sonic The Hedgehog 10-Inch Sonic Plush - Medium-Sized Ultrasoft Official Kelly Toy Plush

144

1K+ bought in past month

\$24⁷⁵ Typical: ~~\$30.45~~

FREE delivery **Mar 6 - 8**
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Only 2 left in stock - order soon.

More Buying Choices
\$21.90 (33 new offers)
Ages: 3 years and up

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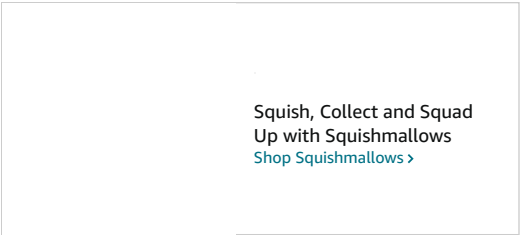
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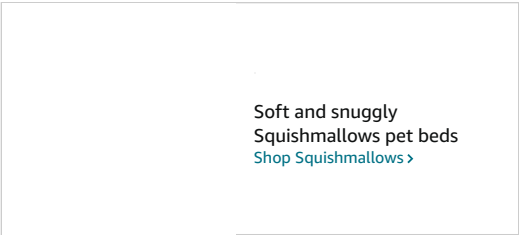
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★★★★★ 1

Pickup **today**



+ Add

\$12⁹⁸

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★★★★★ 1

Pickup **today**



+ Add

\$19⁹⁸

Squishmallows Bunny Treat Pail Plush

★★★★★ 1

Pickup **today**




\$788

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16" Purple...

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Collection...

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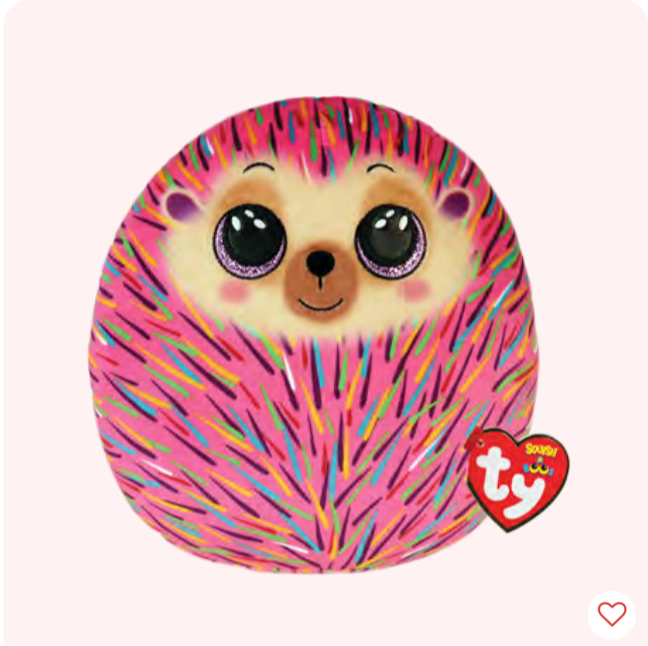
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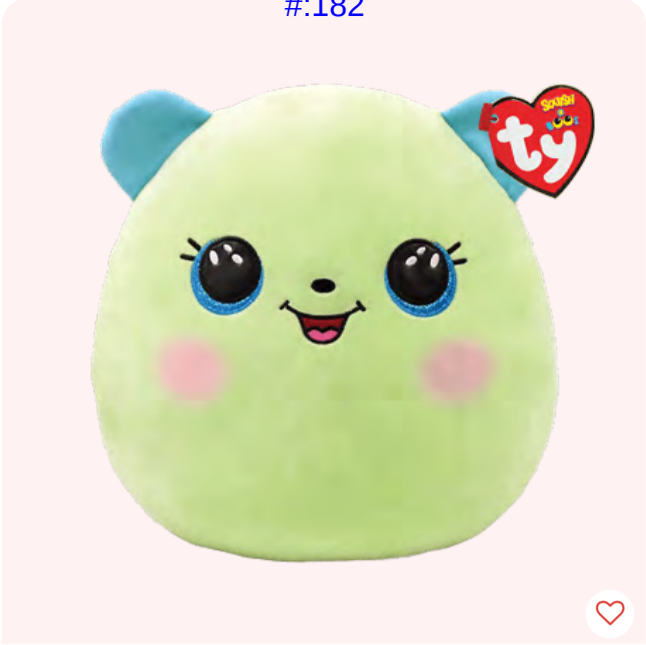
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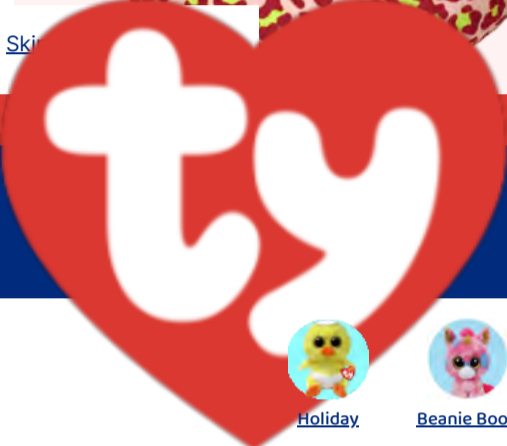


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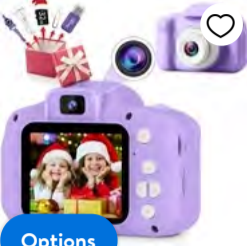
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Clearance



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About this item

Product details

Dan Dee Unicorn Soft Plush 10-inch Basket All Occasions

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Specifications

Brand
Dan Dee

Animal Type
Unicorn

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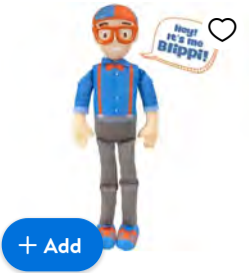
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★★★★★ 409



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★★★★★ 373

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They're giant, round, fuzzy, stuffed animals. Hug them.

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Horace the Nomadic
Monkey is in:
Juneau, Alaska



Squishable News

Holiday Shipping Deadlines!

Orders placed by 5 pm on Tue, 12/16 are guaranteed to arrive by 12/24 via **Standard Shipping**.

Waiting for a restock?

All the squishables are expected back in stock in time for holiday shipping! Join our mailing list and we'll let you know the minute they're back!

28 November 2008

What do we do all day? You really wanna know? Check the [Squishable Twitter Feed](#) to keep tabs on Zoe, Aaron, and our new email guru, Beth

10 October 2008

Woohoo! [Bundle of Bunnies](#) are back!

9 October 2008

You know what we've got? A [squishable lion scarf](#) to fend off the impending cold! Scared of lions, how 'bout a [giraffe](#) or an [alligator](#)!

18 September 2008

Are you heading to New York Anime Festival 2008? So are the squishables! If you're in NYC Sept 26-28, come by booth 535 in the dealers room and say "Heeeeeey!"

#192

Squishable Penguin



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Squishable Shark



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Squishable Rooster



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13 June 2008

Pandas, people, [Pandas](#) are now in stock, along with their chromatic cousins, [Zebras](#)!

30 May 2008

[Hedgehogs](#)! We've got some! Also [Octopuses](#), [Alligators](#), [Piggies](#), and [Sheep](#) are all back in stock! Crazy!

11 May 2008

We're heading to [AnimeCentral](#) from May 16-18! Stop by booth 836 and hug a squishable!

3 May 2008

Best fan video. [Ever](#). I want to be this guy when I grow up.

20 March 2008

Squishy fan Michael wins my personal Photoshop admiration with this [freakishly awesome picture](#).

4 March 2008

It's another [Squishy Fan Video](#)! "Lamborghini" the Leopard and "Lion", the Tiger, valiantly defend themselves against some Supersonic Crushing!! Thanks guys!

27 November 2007

Ohmygodohmygodohmygod. Someone made a squishable fan video!!! Holy crap! Check it out on [youtube](#).

Squishable Octopus



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Squishable Tortoise



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Squishable Sheep

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Squishable Tiger

\$38 | [View](#)
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Squishable Panda

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On the Bench: The run for these Squishables has ended. We might have a couple left...or we might not! [Dalmatian](#), [Frog](#)

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[DC Central Kitchen](#) - The very last octopus auction

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#194

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Categories



In-Stock only

Newest Items



Squishable Wolf

\$54.00



Squishable Dragon Roll

\$52.00



#195

(<https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=squish wolf>).



Squishable Demon Plague Doctor

\$52.00

(<https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=demon plague doctor>).

(<https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=squish drag>



Squishable Spooky Wreath

\$49.00

(<https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=spooky wreath>



Squishable Flocked Wreath

\$49.00

(<https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=flocked wreath>).



Squishable Loves: Reptar
❤️ \$45.00

(<https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=squishloves reptar>



Comfort Food Christmas Tree Cookie

🍪 \$45.00

(<https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=christmas tree cookie>).



Squishable Death's-head Hawkmoth

\$58.00

(<https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=death's head hawkmoth>



Squishable Baby Mothman

\$49.00

(<https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=squish baby mothman>)



Squishable Tie Dye Reaper

\$52.00

(<https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=tie dye reaper>)



Squishable Alligator

\$45.00

(<https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=squishable alligator>)



Squishable Hen

\$49.00

(<https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=squishable hen>)



Squishable Queen Bee

\$48.00

(<https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=squishable queen bee>)



Squishable Palm Tree

\$45.00

(<https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=squish palm tree>)



Comfort Food Soy Sauce

\$45.00

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Screen=PROD&Product Code=comfortfood_soy_sauce)



NEW!

Comfort Food Mustard

 \$48.00


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NEW!

Comfort Food Ketchup

 \$48.00

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Screen=PROD&Product Code=comfortfood_ketchup)



Squishable Lich

\$55.00

(<https://www.squishable.com/mm5/mercha>

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Squishable Caterpillar


\$46.00

([https://www.squishable.com/mm5/merchant.mvc?](https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=squishable_caterpillar)

Screen=PROD&Product Code=squishable_caterpillar)



Comfort Food Christmas
Star Cookie

 \$45.00

(<https://www.squishable.com/mm5/mercha>

Screen=PROD&Product Code=christmas_s



Squishable Oyster

\$52.00

(https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=squish_oyster_15)



Squishable Flocked Christmas Tree

\$49.00

(https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=flocked_christmas_tree)



Comfort Food Sushi Roll

ii

 \$48.00

(https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=squish_sushi_roll_ii)



Comfort Food Smoothie

 \$46.00

(https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=squish_smoothie)



Squishable Baby Goat

\$48.00

(https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=squishable_baby_goat)



Squishable Cotton Candy Baby Unicorn

\$52.00

(https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=squish_cotton_candy_baby_unicorn)



Squishable Hydra

\$58.00

(<https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=squish hydra 15>).



Squishable Apatosaurus

\$52.00

(<https://www.squishable.com/mm5/merchaScreen=PROD&Product Code=squishable>).



Squishable T-Rex II

\$52.00

(<https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=squishable t rex ii>).



Comfort Food
Strawberry Jam

\$46.00

(<https://www.squishable.com/mm5/merchaScreen=PROD&Product Code=comfortfoo>).



Squishable Arctic
Narwhal

\$45.00

(<https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=squish arctic narwhal>).



Squishable Triceratops

\$49.00

(<https://www.squishable.com/mm5/merchaScreen=PROD&Product Code=squishable>).



Squishable Go! Ship

\$35.00

([https://www.squishable.com/mm5/merchant.mvc?](https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=go_ship)

Screen=PROD&Product Code=go_ship).



Comfort Food Cotton Candy

 \$45.00

(<https://www.squishable.com/mm5/mercha>

Screen=PROD&Product Code=comfortfoo



Squishable Water Dragon

\$49.00

([https://www.squishable.com/mm5/merchant.mvc?](https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=squish_water_dragon)

Screen=PROD&Product Code=squish water dragon).



Squishable Strawberry Cow

\$49.00

(<https://www.squishable.com/mm5/mercha>

Screen=PROD&Product Code=squishable



Comfort Food Red Velvet Cupcake

 \$45.00

([https://www.squishable.com/mm5/merchant.mvc?](https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=comfortfood_red_velvet_cupcake)

Screen=PROD&Product Code=comfortfood red velvet cupcake).



Squishable GO! Spaceship

\$39.00

(<https://www.squishable.com/mm5/mercha>

Screen=PROD&Product Code=go_spacesh



Comfort Food Mac 'n Cheese



\$52.00

([https://www.squishable.com/mm5/merchant.mvc?](https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=comfortfood mac and cheese)

[Screen=PROD&Product Code=comfortfood mac and cheese](https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=comfortfood mac and cheese)).



Squishable Coral Octopus

\$49.00

(<https://www.squishable.com/mm5/mercha>

[Screen=PROD&Product Code=squish cora](https://www.squishable.com/mm5/mercha?Screen=PROD&Product Code=squish cora)



Comfort Food Cold Brew



\$49.00

([https://www.squishable.com/mm5/merchant.mvc?](https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=comfortfood cold brew)

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Squishable GO! Airplane

\$39.00

(<https://www.squishable.com/mm5/mercha>

[Screen=PROD&Product Code=go airplane](https://www.squishable.com/mm5/mercha?Screen=PROD&Product Code=go airplane)



Comfort Food Iced Tea



\$49.00

([https://www.squishable.com/mm5/merchant.mvc?](https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=comfortfood iced tea)

[Screen=PROD&Product Code=comfortfood iced tea](https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=comfortfood iced tea)).



Comfort Food Peppermint Mocha



\$48.00

(<https://www.squishable.com/mm5/mercha>

[Screen=PROD&Product Code=comfortfoo](https://www.squishable.com/mm5/mercha?Screen=PROD&Product Code=comfortfoo)



Squishable Succulent

\$52.00

(<https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=squish succulent 15>)



Squishable Baby Axolotl

\$50.00

(<https://www.squishable.com/mm5/mercha> Screen=PROD&Product Code=squish bab



Squishable Wizard

\$49.00

(<https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=squish wizard 15>)



Squishable Gargoyle

\$55.00

(<https://www.squishable.com/mm5/mercha> Screen=PROD&Product Code=squish garc



Squishable Hati

\$55.00

(<https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=squish hati 15>)




Comfort Food
Cheeseburger

 \$49.00

(<https://www.squishable.com/mm5/mercha> Screen=PROD&Product Code=comfortfoo



Comfort Food
Sourdough

 \$48.00

([https://www.squishable.com/mm5/merchant.mvc?](https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=comfortfood_sourdough15)

[Screen=PROD&Product Code=comfortfood_sourdough15](https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=comfortfood_sourdough15))



Comfort Food Ham
Musubi


 \$46.00

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Comfort Food Gumball
Machine

 \$49.00

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[Screen=PROD&Product Code=comfortfood_gumball_machine15](https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=comfortfood_gumball_machine15))



Squishable Blue Jay

\$48.00

([https://www.squishable.com/mm5/merchant.mvc?](https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=squish_blue_jay15)

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Squishable Rose

\$48.00

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Squishable Cuddly
Kangaroo

\$49.00

([https://www.squishable.com/mm5/merchant.mvc?](https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=squish_cuddly_kangaroo15)

[Screen=PROD&Product Code=squish_cuddly_kangaroo15](https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=squish_cuddly_kangaroo15))



Squishable Shadow Dragon

\$52.00

(<https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=squish shadow dragon 15>).



Squishable Baphomet

\$55.00

(<https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=squish bap>



Comfort Food Buttered Toast

 \$48.00

(<https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=comfortfood buttered toast 15>).



Comfort Food Coffee Pot

 \$48.00

(<https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=comfortfoo>



Squishable Cauldron

\$55.00

(<https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=squish cauldron 15>).



Squishable Rattlesnake

\$48.00

(<https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=squish rattl>



Squishable Venus Flytrap

\$55.00

(https://www.squishable.com/mm5/merchant.mvc?

Screen=PROD&Product Code=squish venus fly trap 15



Squishable Lunar Lion

\$49.00

(https://www.squishable.com/mm5/mercha

Screen=PROD&Product Code=squish luna



Squishable Poodle Moth

\$55.00

(https://www.squishable.com/mm5/merchant.mvc?

Screen=PROD&Product Code=squish poodle moth 15



Squishable Rosy Maple Moth

\$55.00

(https://www.squishable.com/mm5/mercha

Screen=PROD&Product Code=squish rosy



Comfort Food Unicorn Latte

\$48.00

(https://www.squishable.com/mm5/merchant.mvc?

Screen=PROD&Product Code=comfortfood unicorn latte 15



Comfort Food Dipped Ice Cream Pop

\$46.00

(https://www.squishable.com/mm5/mercha

Screen=PROD&Product Code=comfortfoo



Squishable Baby Red Panda

\$48.00

(https://www.squishable.com/mm5/merchant.mvc?

Screen=PROD&Product Code=squish baby red panda 15).



Squishable Piggy.

\$46.00

(https://www.squishable.com/mm5/mercha

Screen=PROD&Product Code=squish pig_



Squishable GO! Ambulance

\$39.00

(https://www.squishable.com/mm5/merchant.mvc?

Screen=PROD&Product Code=squish go ambulance 12).



Comfort Food Kabob

\$52.00

(https://www.squishable.com/mm5/mercha

Screen=PROD&Product Code=comfortfoo



Comfort Food Lemonade

\$48.00

(https://www.squishable.com/mm5/merchant.mvc?

Screen=PROD&Product Code=comfortfood lemonade 15).



Squishable Reaper

\$49.00

(https://www.squishable.com/mm5/mercha

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Squishable Plague Nurse

\$49.00

(https://www.squishable.com/mm5/merchant.mvc?

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Squishable Snowy Owl

\$45.00

(https://www.squishable.com/mm5/mercha

Screen=PROD&Product Code=squish sno



Comfort Food Cereal
Box

\$45.00

(https://www.squishable.com/mm5/merchant.mvc?

Screen=PROD&Product Code=comfortfood cereal box 15).



Comfort Food Ramen

\$55.00

(https://www.squishable.com/mm5/mercha

Screen=PROD&Product Code=comfortfoo



Comfort Food Loaf of
Bread

\$45.00

(https://www.squishable.com/mm5/merchant.mvc?

Screen=PROD&Product Code=comfortfood loaf of bread 15).



Squishable Ladybug II

\$48.00

(https://www.squishable.com/mm5/mercha

Screen=PROD&Product Code=squish lady



Comfort Food Unicorn
Cake



\$48.00

([https://www.squishable.com/mm5/merchant.mvc?
Screen=PROD&Product Code=comfortfood unicorn cake 15](https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=comfortfood unicorn cake 15)).



Squishable Mushroom

\$48.00

([https://www.squishable.com/mm5/merchant.mvc?
Screen=PROD&Product Code=squish mus](https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=squish mus)



Squishable Spooky
Ghost

\$45.00

([https://www.squishable.com/mm5/merchant.mvc?
Screen=PROD&Product Code=squish spooky ghost 15](https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=squish spooky ghost 15)).



Squishable GO! Train

\$39.00

([https://www.squishable.com/mm5/merchant.mvc?
Screen=PROD&Product Code=squish go t](https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=squish go t)



Squishable GO! Fire
Truck

\$39.00

([https://www.squishable.com/mm5/merchant.mvc?
Screen=PROD&Product Code=squish go firetruck 12](https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=squish go firetruck 12)).



Squishable GO! Dump
Truck

\$39.00

([https://www.squishable.com/mm5/merchant.mvc?
Screen=PROD&Product Code=squish go c](https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=squish go c)



Squishable GO! Front Loader

\$39.00

([https://www.squishable.com/mm5/merchant.mvc?](https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=squish_go_frontloader_18)

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Squishable Plague Doctor

\$49.00

(<https://www.squishable.com/mm5/mercha>

Screen=PROD&Product Code=squish_plag



Comfort Food Peanut Butter Jar

\$46.00

([https://www.squishable.com/mm5/merchant.mvc?](https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=comfortfood_pb_jar_15)

Screen=PROD&Product Code=comfortfood_pb_jar_15)



Squishable Dolphin III

\$46.00

(<https://www.squishable.com/mm5/mercha>

Screen=PROD&Product Code=squish_dolph



Squishable Baby Corgi

\$48.00

([https://www.squishable.com/mm5/merchant.mvc?](https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=squish_baby_corgi_15)

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Squishable Orca

\$48.00

(<https://www.squishable.com/mm5/mercha>

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Squishable Jellyfish II

\$46.00

(https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product_Code=squish_jellyfish_15_ii)



Comfort Food Broccoli

 \$55.00

(https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product_Code=comfortfoo)



Squishable Baby Panda

\$46.00

(https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product_Code=squish_baby_panda_15)



Comfort Food America Ice Pop

 \$45.00

(https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product_Code=comfortfoo)



Comfort Food Grapes

 \$55.00

(https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product_Code=comfortfood_grapes_15)



Squishable Red Dragon

\$52.00

(https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product_Code=squish_red)



Squishable Snuggly Sloth

\$45.00

(https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=squish_snuggly_sloth_15)



Squishable Sunflower

\$49.00

(<https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=opensquish>)




Squishable NHL® Philadelphia Flyers® Gritty™ Mascot

\$60.00

(https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=nhl_gritty_15)




Comfort Food Soup Dumpling

 \$48.00

(<https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=comfortfoo>)



Comfort Food Popcorn

 \$48.00

(https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=comfortfood_popcorn)



Comfort Food Hot Sauce

 \$44.00

(<https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=comfortfoo>)



Comfort Food Pumpkin
Spice Latte

 \$48.00

([https://www.squishable.com/mm5/merchant.mvc?](https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=comfortfood_pumpkin_spice_latte)

[Screen=PROD&Product Code=comfortfood_pumpkin_spice_latte](https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=comfortfood_pumpkin_spice_latte)).



Squishable Sakura
Dragon

\$49.00

([https://www.squishable.com/mm5/merchant](https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=squish_saku)

[Screen=PROD&Product Code=squish_saku](https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=squish_saku)



Comfort Food Matcha
Tea

 \$45.00

([https://www.squishable.com/mm5/merchant.mvc?](https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=comfortfood_matcha_latte)

[Screen=PROD&Product Code=comfortfood_matcha_latte](https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=comfortfood_matcha_latte)).



Squishable Mint
Octopus

\$49.00

([https://www.squishable.com/mm5/merchant](https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=squish_mint)

[Screen=PROD&Product Code=squish_mint](https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=squish_mint)



Comfort Food Bubble
Tea

 \$49.00

([https://www.squishable.com/mm5/merchant.mvc?](https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=comfortfood_bubble_tea)

[Screen=PROD&Product Code=comfortfood_bubble_tea](https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=comfortfood_bubble_tea)).



Squishable Dachshund
Hot Dog

\$46.00

([https://www.squishable.com/mm5/merchant](https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=squish_hot)

[Screen=PROD&Product Code=squish_hot](https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=squish_hot)



Squishable Baby Owl

\$46.00

(<https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=squish baby owl 15>)



Comfort Food Onigiri

 \$46.00

(<https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=comfortfood>)



Squishable Baby Penguin

\$46.00

(<https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=squish baby penguin 15>)



Squishable Baby Koala

\$46.00

(<https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=squish baby koala 15>)



Comfort Food Avocado Toast

 \$48.00

(<https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=comfortfood avocado toast>)



Squishable Cute Octopus

\$49.00

(<https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=squish cute octopus 15>)



Squishable Fluffy Bunny.

\$49.00

([https://www.squishable.com/mm5/merchant.mvc?](https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=squish_fluffy_bunny_15)

Screen=PROD&Product Code=squish_fluffy_bunny_15).



Squishable Baby.

Raccoon

\$46.00

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III

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Comfort Food Banana

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Squishable Comfort Food Taco

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Comfort Food Avocado

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Comfort Food Hot Dog

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Comfort Food
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Comfort Food
Watermelon


 \$45.00

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Comfort Food Shrimp
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Hamburger



\$45.00

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Screen=PROD&Product Code=squish hamburger 15](https://www.squishable.com/mm5/merchant.mvc?Screen=PROD&Product Code=squish hamburger 15)).



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Squishable Pink Donut



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Squishable Narwhal

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Squishable Great White
Shark

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Yummy World Backpack Sandy - Kidrobot - 1



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Yummy World Backpack Sandy

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YUMMY WORLD Cheezy Pie Small Plush

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Welcome to Yummy World. Yummy World is the softer side of the iconic Kidrobot brand featuring a selection of deliciously unique and trendy Yummy World plush toys, soft plush food pillows, collectible vinyl keychains, food plushies and more. Yummy World is loved by everyone from celebrities to fashionistas to kids and parents. Jump into Yummy World and start collecting today!

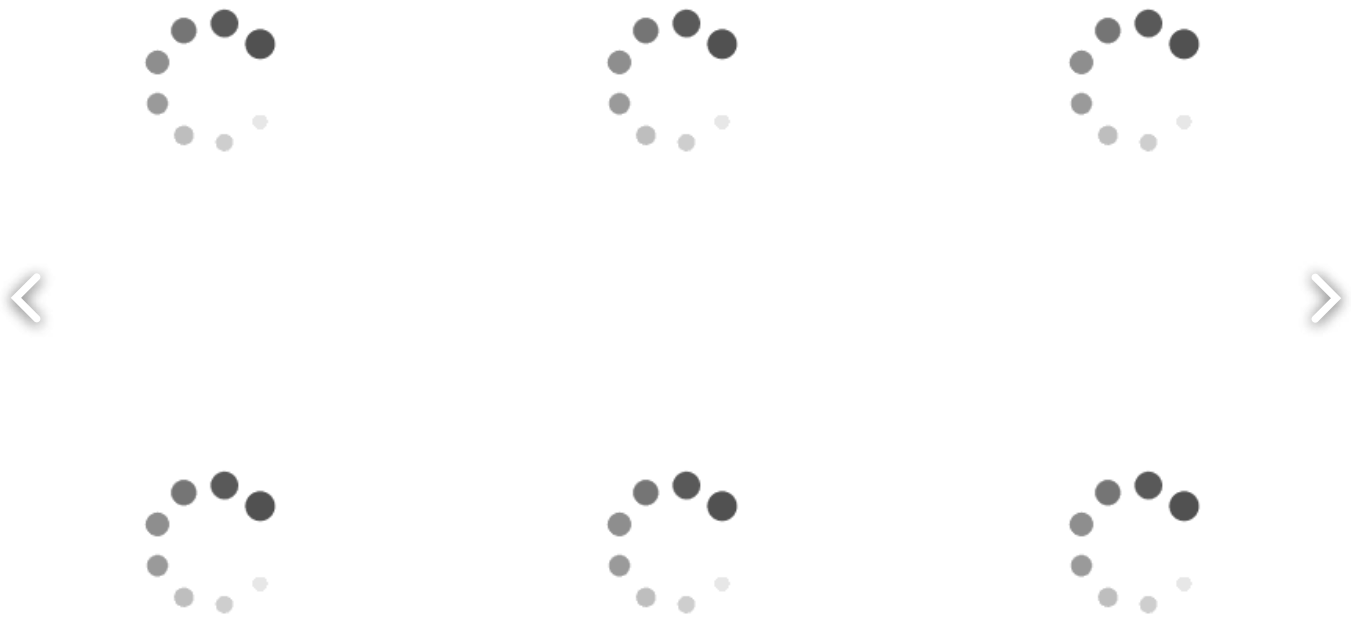
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Yummy World Cecily the Scented Cinnamon
Roll Plush (PRE-ORDER)



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Coca-Cola Can Plush with Sound (PRE-
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No Reviews

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No Reviews



Yummy World Camille the Yummy Meal XL
Interactive Plush by Kidrobot

\$ 59.99

72 reviews



Yummy World XL Cheesy Puffs Interactive
Food Plush

\$ 59.99

71 reviews



Yummy World Ernest Eggplant & Georgia
Plush 2-Pack

\$ 39.99



Yummy World Zoey and the YumYumables XL
Interactive Plush

\$ 54.99

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3 reviews

#231

61 reviews



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19 reviews



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16 reviews



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\$ 10.99

16 reviews



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19 reviews



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Interactive Plush

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6 reviews



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2 reviews



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Plush

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1 review



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 22 reviews



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Interactive Plush
\$ 34.99
2 reviews



Yummy World Haylee Heart Cookie 10" Plush
\$ 19.99
14 reviews



Yummy World 16" French Fries Plush with
Interactive Plushie Fries
\$ 34.99
1 reviews



Yummy World Breezy and the Twists Licorice
Candy Plush
\$ 34.99
16 reviews



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Interactive Plush

\$ 34.99

20 reviews



Yummy World 16" Avocado Plush with
Interactive Plushie Pit

\$ 36.99

22 reviews



Yummy World Milk and Cookies Interactive
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\$ 54.99

19 reviews



Yummy World Sweet and Savory Blind Box
Keychains

from \$ 6.99

13 reviews

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Yummy World Attack of the Donuts Keychain
Series by Kidrobot
from \$ 5.99
6 reviews



Yummy World Parker & Jayden Peanut Butter
and Jelly Sandwich Plush
\$ 34.99
24 reviews



Yummy World 10\"/>



Yummy World XL Victorio Veggie Taco Plush
Set
\$ 54.99
13 reviews





Yummy World Bubba the Shrimp Nigiri Sushi
Interactive Plush
\$ 34.99
3 reviews



Yummy World 10" Pancake Plush Pillow
\$ 24.99
15 reviews



Yummy World Smores Samantha S'more
Plush Toy by Kidrobot
\$ 34.99
10 reviews



Yummy World Bruce the Banana Interactive
Plush by Kidrobot
\$ 34.99
17 reviews





Plush

12 reviews

\$ 6.99

9 reviews



\$ 24.99

14 reviews

Kidrobot

\$ 19.99

9 reviews





Yummy World Jeni and the Jelly Beans XL
Interactive Plush

\$ 54.99

10 reviews



Yummy World 10" Sandy the Ice Cream
Sandwich Plush Pillow

\$ 24.99

13 reviews



Yummy World Jack O'Lantern Interactive
Pumpkin Plush with Candy Corns

\$ 39.99

reviews



Yummy World 16" Gingerbread Man Jimmy
Interactive Plush

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5 reviews



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3 reviews



Yummy World Strawberry 10" Plush Pillow
\$ 19.99
3 reviews



Yummy World Walter Waffle Cone Ice Cream
Scoop Plush
\$ 24.99
6 reviews



Yummy World Gus the Gummy Worm Plush
Toy
\$ 24.99
2 reviews





Yummy World Lola Lollipop Small Carnival
Plush
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4 reviews



Yummy World Rainbow Soft Serve Sally Ice
Cream Cone Plush
\$ 36.99
3 reviews

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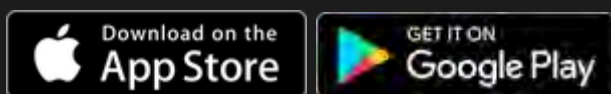
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Telephone: (310) 478-4100
Facsimile: (310) 479-1422

*Attorneys for Plaintiffs Kellytoy (USA),
Inc. and Kellytoy Worldwide, Inc.*

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA – WESTERN DIVISION

KELLYTOY (USA), INC., a California
corporation; and KELLYTOY
WORLDWIDE, INC., a California
corporation;

Plaintiffs,

vs.

DAN-DEE INTERNATIONAL, LTD.,
a Delaware corporation; RITE AID
CORPORATION, a Delaware
corporation, and DOES 1 through 10,
inclusive,

Defendants.

Case No. 2:18-cv-05399 JAK (AGRx)

**FIRST AMENDED COMPLAINT
FOR:**

- 1. FEDERAL COPYRIGHT
INFRINGEMENT (17 U.S.C. § 501);**
- 2. FEDERAL TRADEMARK
INFRINGEMENT, FALSE
DESIGNATION OF ORIGIN AND
FALSE DESCRIPTION (15 U.S.C. §
1125);**
- 3. COMMON LAW TRADEMARK
INFRINGEMENT**
- 4. CALIFORNIA COMMON LAW
UNFAIR COMPETITION; AND**
- 5. CALIFORNIA STATUTORY
UNFAIR COMPETITION**

DEMAND FOR JURY TRIAL

Plaintiffs KELLYTOY (USA), INC., a California corporation and
KELLYTOY WORLDWIDE, INC., a California corporation (collectively,
“Kellytoy”) bring this action against defendant DAN-DEE INTERNATIONAL,
LTD., a Delaware corporation (“Dan-Dee”), RITE AID CORPORATION, a
Delaware corporation (“Rite Aid”), and DOES 1 through 10 (collectively,

1 “Defendants”) for injunctive relief and damages under the laws of the United States
2 and the State of California as follows:

3 **JURISDICTION AND VENUE**

4 1. This action arises under the copyright laws of the United States, 17
5 U.S.C. § 101 *et seq.*, the trademark laws of the United States, 15 U.S.C. § 1125(a),
6 and under the statutory and common law of trademark/trademark infringement and
7 unfair competition.

8 2. This Court has jurisdiction under 28 U.S.C. §§ 1331, 1338, and 1367,
9 and 15 U.S.C. §§ 1116, 1117, 1121, and 1125.

10 3. Venue lies in this judicial district pursuant to 28 U.S.C. § 1391 and
11 1400(a).

12 4. This Court has personal jurisdiction over Defendants, as Defendants are
13 doing business in California and this District and are subject to the jurisdiction of
14 this Court. Indeed, defendant Dan-Dee actively distributes plush toys throughout
15 the state of California and this District. Similarly, defendant Rite Aid has numerous
16 retail stores within the state of California and this District. In addition, defendants
17 Dan-Dee and Rite Aid knowingly infringed on Kellytoy’s copyrights and trade
18 dress, knowing that Kellytoy is a California resident, and thereby purposefully
19 directed their activities towards California.

20 **NATURE OF THE ACTION**

21 5. This is an action for copyright infringement under the Copyright Act,
22 17 U.S.C. §§ 101, *et seq.*; and trade dress infringement, trademark infringement,
23 unfair competition and false designation of origin under the Lanham Act, 15 U.S.C.
24 § 1125(a), California Bus. & Prof. Code § 17200, *et seq.*, and the common law.

25 6. Kellytoy’s SQUISHMALLOW branded plush toys (“Squishmallows”)
26 – representative samples of which are depicted in **Exhibit 1** hereto – are one of the
27 world’s hottest plush toy lines. Kellytoy’s Squishmallows feature a highly
28 distinctive and widely recognized trade dress, which Kellytoy pioneered and

1 created. Kellytoy actively markets its Squishmallows through numerous media
2 outlets, including, without limitation, on social media, at tradeshow, through
3 Squishmallows.com, amazon.com, walmart.com, walgreens.com and target.com,
4 and on Kellytoy's website, depicting images of its proprietary Squishmallows line of
5 plush toys.

6 7. Now that Kellytoy's Squishmallows have exploded in popularity and
7 have garnered much customer and industry recognition, Kellytoy discovered that
8 defendant Dan-Dee has been manufacturing and offering for sale to Rite Aid two
9 knock-off products for distribution within this state and district that both infringe
10 upon Kellytoy's trade dress and one of which infringes upon Kellytoy's copyrighted
11 design in its Squishmallows.

12 8. Accordingly, to prevent and remediate the rampant consumer confusion
13 and misappropriation of Kellytoy's copyrighted designs in its Squishmallows
14 resulting from Defendants' unauthorized use, promotion and sale of the Infringing
15 Plush (defined below), and to compensate Kellytoy for its injuries, Kellytoy seeks
16 immediate and permanent injunctive relief, compensatory damages, disgorgement of
17 Defendants' profits, statutory damages, punitive damages, Kellytoy's reasonable
18 attorneys' fees and expenses, a product recall, and corrective advertising sufficient
19 to address Defendants' wrongdoing.

20 **THE PARTIES**

21 9. Kellytoy (USA), Inc. is a California corporation with its principal place
22 of business located in Los Angeles, California.

23 10. Kellytoy Worldwide, Inc. is a California corporation with its principal
24 place of business located in Los Angeles, California.

25 11. Kellytoy is in the business of developing, manufacturing and selling
26 children's toys including, among other things, plush toys.

27 12. On information and belief, defendant Dan-Dee International, LTD.
28 ("Dan-Dee") is a Delaware corporation with a place of business in New Jersey.

1 13. Dan-Dee is in the business of manufacturing and selling children's toys
2 including, among other things, plush toys.

3 14. On information and belief, defendant Rite Aid Corporation ("Rite
4 Aid") is a Delaware corporation with a place of business in Pennsylvania and
5 numerous stores in this judicial district.

6 15. Rite Aid is in the business of owning and operating drug stores and
7 pharmacies throughout the United States and, on information and belief, this District
8 that sell various merchandise, including plush toys bearing third-party trademarks
9 and under its own private label, RITE STUFF.

10 16. The true names and capacities of defendants sued herein as DOES 1-
11 10, inclusive, are unknown to Kellytoy, who therefore sues said defendants by such
12 fictitious names. Kellytoy will amend this Complaint to allege their true names and
13 capacities when the same are ascertained.

14 17. Upon information and belief, at all relevant times mentioned in this
15 Complaint, Defendants, and each of them, were acting in concert and active
16 participation with each other in committing the wrongful acts alleged herein, and
17 were the agents of each other and were acting within the scope and authority of that
18 agency and with the knowledge, consent and permission of one another.

19 **BACKGROUND FACTS**

20 **Kellytoy and Its Protected Intellectual Property Rights**

21 18. Kellytoy is engaged in the business of creating, manufacturing,
22 distributing and selling unique plush toys, including, without limitation, its
23 Squishmallows line of plush under the SQUISHMALLOW brand. (*See, e.g.,*
24 **Exhibit 1.**)

25 19. Kellytoy has been in business for approximately 35 years and in that
26 time has developed a reputation for producing high quality, unique, creative and
27 innovative plush toys that are highly prized in the industry.

28 20. Kellytoy exerts great efforts to promote and preserve its image identity

1 and the image and identity of its high quality plush toys, including by creating
2 distinctive designs and marks for use on its products and seeking U.S. trademark
3 and copyright registrations for such designs and marks, including those at issue in
4 this Complaint.

5 21. In 2016, Kellytoy conceived of and began creating its Squishmallows
6 line of plush toy designs, ultimately marketed in connection with the
7 SQUISHMALLOW trademark, that share common, unique features that distinguish
8 them from the goods of others. These designs are wholly original to Kellytoy and
9 comprise copyrightable subject matter under the laws of the United States.

10 22. Kellytoy has been and is the sole owner of all right, title and interest in
11 and to the copyrights in the individual “characters” in the Squishmallows line and
12 the distinguishing, unique, and recognizable features that are common across the
13 Squishmallows line. From 2016 to the present, Kellytoy has expended large sums
14 of money in developing, advertising and promoting these product designs through
15 the United States. In fact, Kellytoy is spending approximately \$50,000 per month in
16 direct to consumer and business-to-business advertising in connection with its
17 SQUISHMALLOW branded goods.

18 23. Kellytoy sells a broad range of Squishmallows that feature the brand’s
19 iconic trade dress, which is not easily reduced to writing, but includes, without
20 limitation: (1) substantially bell-shaped plush toys embodying fanciful renditions of
21 animals/characters, (2) embroidered anime-inspired minimalist, whimsical facial
22 features, (3) a velvety velour-like textured exterior, and (4) stuffing with a light
23 “marshmallow,” memory foam-like texture – as more fully depicted in **Exhibit 1**
24 hereto – features common to Kellytoy’s line of Squishmallows (collectively together
25 with **Exhibit 1** the “Squishmallow Trade Dress”).

26 24. The plush designs depicted in **Exhibit 2** – a subset of Kellytoy’s line of
27 Squishmallows – comprise some of Kellytoy’s most popular Squishmallows, which
28 were created by or assigned to Kellytoy (the “Squishmallow Designs”). As set forth

1 in greater detail below, these Squishmallow Designs are the subject of Copyright
2 Registrations issued by the United States Copyright Office, pursuant to 17 U.S.C.
3 §101 *et seq.*

4 25. Continuously and without interruption, beginning in 2016, Kellytoy has
5 expended a great deal of time, effort, and money in the promotion of its
6 Squishmallows. Due to Kellytoy's unique design, extensive marketing efforts,
7 media coverage, and market penetration, the Squishmallow Trade Dress has
8 acquired distinctiveness in the marketplace when applied to plush toys. Indeed,
9 because of Kellytoy's extensive promotional activities and widespread display of its
10 Squishmallows directed to the public, and a consequence of Kellytoy's fair and
11 honorable dealings with its customers, the relevant consuming public has come to
12 recognize and associate plush toys bearing the Squishmallow Trade Dress as high
13 quality goods connected with or offered by a single source, Kellytoy. The
14 Squishmallow Trade Dress has valuable goodwill and consumer recognition
15 associated with it and has come to symbolize the valuable goodwill and reputation
16 of Kellytoy.

17 26. In addition to being original and inherently distinctive, the
18 Squishmallow Trade Dress is widely recognized by consumers. A simple Internet
19 search using the Google search engine yields about 140,000 "hits" for the search
20 term "Squishmallows."

21 27. In addition to marketing and selling them through thousands of retail
22 stores nationwide, Kellytoy markets and sells its Squishmallows on its website
23 <squishmallows.com> featuring dozens of copyright-protected photographs of its
24 plush toys and models holding its Squishmallows. Copies of the homepage and
25 other representative pages from <squishmallows.com> are attached as **Exhibit 3**.

26 28. Further adding to their recognizability and secondary meaning in the
27 marketplace, Squishmallows have been featured in numerous magazines, press
28 articles, reviews, and videos, as set forth in greater detail in **Exhibit 4** hereto,

1 including many mainstream media outlets such as the *Washington Post*, the *Chicago*
2 *Tribune*, the *Daily Harold*, *Okay! Magazine*, among others. By way of example
3 only, Squishmallows have been also recognized by The *Washington Post* and
4 *Consumer Reports* on their 2017 Holiday Gift Guides; *LA Parent* recognized
5 Squishmallows in its October 2017 issue, under the "Products We Love" section;
6 and, as depicted below, *OK!* Magazine featured Squishmallows in its August 21,
7 2017 issue, stating "Cuddly as they are cute, they make great couch pals, pillows
8 and bedtime buddies in any home. Collect the whole squad! squishmallows.com."



29. Kellytoy's Squishmallows have also been featured in the October 2017
issues of *L.A. Parent Magazine*, *City Parent Magazine*, and *San Diego Family*
Magazine and included in the 2017 gift guides for various publications, including in
The Washington Post, *The Houston Chronicle*, and *L.A. Parent*.

30. Kellytoy's Squishmallows have also been the subject of numerous
industry awards and product recommendation lists, including by the National
Parenting Product Awards, Parents' Choice, and TTPM, as more fully set out in

1 **Exhibit 4.** In fact, Kellytoy’s Squishmallows were named by *Toy Insider* as one of
2 the “Top Holiday Toys,” made the cover the September/October 2017 *Toy Book*
3 *Magazine*, and have been featured in numerous other trade magazines, such as,
4 *Teddy Bear and Friends Magazine* and *Animal Tales Magazine*.

5 31. Kellytoy’s Squishmallows have also been the subject of extensive
6 marketing campaigns, including email campaigns, social media posts, and direct to
7 consumer advertising. Kellytoy’s Squishmallows currently have nearly 21,000
8 Instagram followers, more than 30,000 Facebook followers – more than many
9 longer-existing and well-known plush brands. To its followers, Kellytoy regularly
10 publishes photographs of its Squishmallows. Many of these followers, in turn, share
11 these posts with their friends and social media followers. A copy of Squishmallows
12 Instagram page is attached as **Exhibit 5**.

13 32. In addition, hundreds of well-known YouTube influencers and vloggers
14 have shared and posted images and videos of themselves holding plush toys in
15 Kellytoy’s line of Squishmallows products. Tens of thousands of consumers have
16 done the same through numerous media platforms, including, Facebook, Instagram,
17 Pinterest and YouTube. These posts have generated millions of “likes” and “shares.”

18 33. Fans have been extremely engaged on social media, including
19 Facebook and Instagram, demonstrating their awareness and affection for Kellytoy’s
20 Squishmallows, with the average Squishmallows post likes on Instagram hovering
21 over 1000+ per post and 45-100 average comments per post.

22 34. Kellytoy’s Squishmallow website traffic has grown exponentially since
23 its launch in 2017 to an average of 4,313 visits per day.

24 35. Kellytoy’s Squishmallows are listed amongst the leading global brands
25 and toys such as Hatchimals, Hasbro, RB, Hot Wheels, NERF, and Spin Master by
26 several industry publications.

27 36. As a direct result of Kellytoy’s efforts at promoting and building its
28 brand, Kellytoy’s Squishmallows line has exploded in popularity, creating

1 substantial demand for and interest in Squishmallows, and generating enormous
2 goodwill in the Squishmallows brand and the Squishmallows Trade Dress in the
3 United States and around the world. In fact, Kellytoy's Squishmallows are sold
4 through hundreds of retailers including some of the largest retailers in the country,
5 including, approximately 1000 Costco stores, 5,500 Walmart stores, 8,500
6 Walgreens stores, 4,000 Kroger supermarkets and Fred Meyer stores, 2000 Target
7 stores, 900 Party City stores, amongst other outfits such as Dave & Busters, Knotts
8 Berry Farms and numerous others.

9 37. Since the summer of 2017, Kellytoy has sold a whopping 11 million
10 (11,000,000) units of Squishmallows with no indication that sales will be slowing
11 down anytime soon. Kellytoy's Squishmallows products embodying the
12 Squishmallows Trade Dress have yielded tens of millions of dollars of sales in the
13 U.S. over the past year.

14 38. In fact, Kellytoy's Squishmallows sold out through Walgreens.com
15 during their Gift of the Week promotion in early November 2017, as well as
16 exceeding all sales goals for the campaign, both online and in stores.

17 39. Because of Squishmallows' massive success and popularity, consumers
18 have come to associate Kellytoy's high-quality Squishmallows plush toys with the
19 Squishmallows Trade Dress and, conversely, have come to recognize the
20 Squishmallow Trade Dress as a designation of source.

21 **Defendants' Unlawful Conduct**

22 40. At the outset, none of the defendants to this action is licensed or
23 otherwise authorized by Kellytoy to market or distribute products bearing or
24 embodying Kellytoy's Squishmallow Designs and/or Squishmallow Trade Dress.

25 41. Upon information and belief, sometime in spring of 2018, notably well
26 after Kellytoy established its reputation in its Squishmallow Trade Dress, Defendant
27 Dan-Dee entered into an agreement with defendant Rite Aid to have Dan-Dee sell
28 and supply to Rite Aid various plush toys bearing substantially similar copies of

1 Kellytoy's Squishmallow Designs and Squishmallow Trade Dress (hereinafter
2 referred to as "Infringing Plush") for distribution by Rite Aid through its United
3 States stores. Photographs of the Infringing Plush bearing Dan-Dee and Rite Aid's
4 trademarks are collectively attached hereto as **Exhibit 6**.

5 42. Upon information and belief, Dan-Dee offered to sell the Infringing
6 Plush to Rite Aid in the United States, corresponded across state lines with Rite Aid
7 in the United States concerning the production, sale, and distribution of the
8 Infringing Plush, and transported the Infringing Plush to Rite Aid in interstate
9 commerce.

10 43. Upon information and belief, Defendants manufactured in, and
11 imported from, China a production run of the Infringing Plush into the United States
12 for the purpose of having the Infringing Plush enter interstate commerce and/or to
13 be transported or used in interstate commerce through the same channels of trade
14 through which Kellytoy sells its Squishmallows plush.

15 44. Upon information and belief, Dan-Dee has agreed to sell the Infringing
16 Plush to Rite Aid at prices that were/are relatively lower than the prices charged by
17 Kellytoy for its Squishmallows plush. Kellytoy is informed and believes that Dan-
18 Dee is able to undercut Kellytoy's sales prices because Dan-Dee has, rather than
19 investing in creating its own designs and identity, copied Kellytoy's proprietary
20 Squishmallow Designs and Squishmallow Trade Dress and because Defendants'
21 Infringing Plush are of inferior quality as compared to Kellytoy's
22 SQUISHMALLOW branded plush.

23 45. In fact, Kellytoy met with buyers from Rite Aid in 2017 during which
24 Kellytoy showed the buyers Kellytoy's Squishmallows line of products together
25 with pricing therefor, after which, Kellytoy suspects that Rite Aid submitted
26 Kellytoy's bid, together with facsimiles of the designs, to defendant Dan-Dee to
27 obtain a competing bid from Dan-Dee for copies thereof.

28 46. Kellytoy is informed and believes that Defendants, without Kellytoy's

1 consent or permission, intend to sell, advertise, promote, display, and distribute, toys
2 bearing Squishmallow Designs and Squishmallow Trade Dress in United States
3 commerce.

4 47. The activities of Defendants in copying, distributing, advertising,
5 selling, offering for sale and otherwise using the Squishmallow Trade Dress
6 embodied in the Infringing Plush – including by wholesaley copying the shape and
7 look – constitute false designation of origin regarding sponsorship of those plush
8 toys and falsely represent to the public that Defendants' plush toys originate from
9 Kellytoy, and/or that Defendants' plush toys have been sponsored, approved or
10 licensed by Kellytoy, or in some way affiliated or connected with Kellytoy. Such
11 activities of Defendants are likely to confuse, mislead, and deceive Defendants'
12 customers, purchasers, and members of the public as to the origin of the toys bearing
13 the Squishmallow Trade Dress, or to cause such persons to believe that Defendants'
14 Infringing Plush and/or Defendants have been sponsored, approved, authorized, or
15 licensed by Kellytoy or in some way affiliated or connected with Kellytoy, all in
16 violation of 15 U.S.C. §1125(a).

17 48. Upon information and belief, the activities of Defendants were done
18 willfully with full knowledge of the falsity of such designations of origin and false
19 descriptions or representations, with the intent to trade on the enormous goodwill
20 Kellytoy has earned in its Squishmallows, and with the intent to cause confusion,
21 and to mislead and deceive the purchasing public into believing that the products
22 Defendants sell are directly sponsored by, authorized, by, associated with, or
23 originate from Kellytoy.

24 49. As further evidence of Dan-Dee's intent to trade upon Kellytoy's
25 goodwill in Kellytoy's Squishmallows line of plush toys, Defendants repurposed
26 one of Dan-Dee's numerous old trademarks, i.e. SQUISHY, used in the past on very
27 different plush toys for use in connection with the Infringing Plush.

28 50. Defendants, by their unauthorized copying and use of Kellytoy's

1 Squishmallow Designs and Squishmallow Trade Dress, have engaged and will
2 engage in acts of copyright infringement, unfair competition, unlawful
3 appropriation, unjust enrichment, wrongful deception of the purchasing public, and
4 unlawful trading on Kellytoy's good will and the public acceptance of Kellytoy's
5 original works. Defendants activities will damage the reputation, business and good
6 will of Kellytoy nationally and in this judicial district.

7 51. Upon information and belief, unless enjoined by the Court, Defendants
8 will continue and further escalate their infringing activities.

9 52. Kellytoy has no adequate remedy at law. Thus said activities of
10 Defendants have caused and, if not enjoined, will continue to cause irreparable,
11 immediate and impending harm and damage to Kellytoy's business, and to the
12 business, business reputation and good will of Kellytoy.

13 **FIRST CAUSE OF ACTION**

14 **(Federal Copyright Infringement -- 17 U.S.C. §501)**

15 (Against all Defendants)

16 53. Kellytoy repeats and realleges each and every allegation above as
17 though fully set forth herein.

18 54. Kellytoy owns a valid copyright in the Squishmallow Designs. The
19 Squishmallow Designs are original, decorative, and non-functional. After having
20 had access to Kellytoy's Squishmallow Designs, Defendants, without authorization
21 from Kellytoy, have designed, manufactured, distributed, advertised, offered for sale
22 and/or sold the Infringing Plush unicorn design depicted in **Exhibit 7** bearing a
23 design that Defendants copied from the Squishmallow Designs.

24 55. All of the Squishmallow Designs were originally created by Kellytoy
25 or were assigned to and are owned by Kellytoy.

26 56. The Squishmallow Designs comprise original works of authorship that
27 may be copyrighted under United States law. In fact, Kellytoy has complied with
28 requirements of Title 17 of the United States Code with respect to the registration of

1 Kellytoy's unicorn Squishmallow Designs depicted in **Exhibit 2**, as evidenced by
2 United States Copyright Registration Nos. VA0002096020 and VA0002093075,
3 entitling Kellytoy to the exclusive rights and privileges in and to the above-
4 referenced copyrights. These copyright registrations are valid and subsisting.

5 57. Defendants have imitated, displayed, reproduced, distributed, and/or
6 created derivative works from the subject matter embodied in the Squishmallow
7 Designs in connection with Defendants' manufacture, promotion, and solicitation
8 and acceptance of orders for the sale of Defendants' Infringing Plush unicorn design
9 depicted in **Exhibit 7**.

10 58. Defendants' acts are in violation of the exclusive rights of the copyright
11 holder to reproduce, distribute, display, and create derivative works from the
12 copyrighted Squishmallow Designs, as articulated in 17 U.S.C. § 106. Defendants
13 have thereby infringed Kellytoy's copyrights in the Squishmallow Designs.

14 59. Such activities and conduct has caused Kellytoy injury for which it is
15 entitled to recover under 17 U.S.C. § 504.

16 60. On information and belief, Defendants' infringing acts were committed
17 with knowledge or in reckless disregard of Kellytoy's exclusive rights in the
18 Squishmallow Designs.

19 61. On information and belief, as a result of Defendants' copyright
20 infringement, they have made substantial profits and gains to which they are not
21 entitled to retain.

22 62. As a direct and proximate result of Defendants' unlawful conduct,
23 Defendants have caused and will continue to cause irreparable injury to Kellytoy,
24 for which Kellytoy has no adequate remedy at law. Unless Defendants are
25 restrained by this Court from continuing their imitation, copying, display,
26 distribution, reproduction and creation of derivative works from the works
27 embodied in the copyrighted Squishmallow Designs, these injuries will continue to
28 occur. Accordingly, Kellytoy is entitled to preliminary and permanent injunctions

1 restraining Defendants' infringing conduct, pursuant to 17 U.S.C. § 502.

2 **SECOND CAUSE OF ACTION**

3 **(Trademark Infringement, False Designation of Origin and False Description --**

4 **15 U.S.C. §1125)**

5 **(Against All Defendants)**

6 63. Kellytoy repeats and realleges each and every allegation of paragraphs
7 1 through 52 above as if fully set forth herein.

8 64. The Squishmallow Trade Dress is non-functional and highly
9 distinctive, and has become associated in the public mind with plush toy products of
10 the highest quality and reputation finding their origin in a single source, Kellytoy.

11 65. Kellytoy owns all right, title and interest in and to the Squishmallow
12 Trade Dress.

13 66. Without Kellytoy's authorization or consent, and having knowledge of
14 Kellytoy's prior rights in the Squishmallow Trade Dress, Defendants have designed,
15 manufactured, imported, distributed, advertised, offered for sale and/or sold and/or
16 will soon commence importation, distribution, advertising, offers for sale, and sale
17 of replicas of the Squishmallow Trade Dress to the consuming public in direct
18 competition with Kellytoy, in or affecting interstate commerce.

19 67. The Infringing Plush designs are confusingly similar to the
20 Squishmallow Trade Dress. Defendants' use of the Squishmallow Trade Dress has
21 caused and, unless enjoined by this Court, will continue to cause a likelihood of
22 confusion and deception of members of the public and, additionally, injury to
23 Kellytoy's goodwill and reputation as symbolized by the Squishmallow Trade
24 Dress.

25 68. Defendants' use and further threatened uses of the Squishmallow Trade
26 Dress thus constitutes trade dress infringement, false designation of origin and
27 unfair competition in violation of 15 U.S.C. § 1125(a).

28 69. As a direct and proximate result of Defendants' unlawful conduct,

1 Defendants have misappropriated Kellytoy's rights in the Squishmallow Trade
2 Dress, as well as the goodwill associated therewith, and have diverted sales and
3 profits from Kellytoy to Defendants. Thus, as a direct and proximate result of
4 Defendants' acts of willful infringement, Kellytoy has suffered and/or will suffer
5 damage to its valuable brand and reputation, and other damages in an amount to be
6 proven at trial, including Defendants' profits and Kellytoy's lost profits.

7 70. Defendants' actions described above will cause, have caused, and will
8 continue to cause irreparable damage to Kellytoy, unless Defendants are restrained
9 by this Court. Kellytoy has no adequate remedy at law with regard to Defendants'
10 infringing conduct. Accordingly, Kellytoy is entitled to a preliminary and
11 permanent injunction, pursuant to 15 U.S.C. § 1116, restraining and enjoining
12 Defendants' and their agents, servants, and employees, and all persons acting
13 thereunder, in concert with, or on their behalf, from using Kellytoy's Squishmallow
14 Trade Dress, or any colorable imitation or variation thereof, in connection with the
15 sale and/or marketing of any products.

16 71. Defendants' aforesaid acts are exceptional within the meaning of 15
17 U.S.C § 1117.

18 **THIRD CAUSE OF ACTION**
19 **(Common Law Trademark Infringement)**

20 (Against all Defendants)

21 72. Kellytoy repeats and re-alleges each and every allegation of paragraphs
22 1 through 52 and 64 through 67 as though fully set forth herein.

23 73. Defendants have violated Kellytoy's exclusive common law rights in
24 the Squishmallow Trade Dress.

25 74. Kellytoy has continuously used its Squishmallow Trade Dress to
26 identify its goods in California and elsewhere, and to distinguish them from goods
27 of a different origin. As such, Kellytoy has common law rights to the Squishmallow
28 Trade Dress.

1 75. Defendants' acts described above constitute trade mark infringement
2 under the common laws of the United States, including California.

3 **FOURTH CAUSE OF ACTION**

4 **(California Common Law Unfair Competition)**

5 (Against all Defendants)

6 76. Kellytoy repeats and re-alleges each and every allegation of paragraphs
7 1 through 52 and 64 through 67 as though fully set forth herein.

8 77. This claim arises under the common law of the State of California
9 relating to unfair competition.

10 78. Defendants' Infringing Plush incorporate matter constituting
11 reproductions, copies and colorable imitations of Kellytoy's Squishmallow Trade
12 Dress. Defendants' unauthorized use of Kellytoy's Squishmallow Trade Dress
13 constitutes unfair competition, and is likely to cause confusion and mistake in the
14 minds of the trade and the purchasing public as to the source of the parties' products
15 and to cause purchasers to believe Defendants' products are authentic products of
16 Kellytoy when in fact they are not.

17 79. Upon information and belief, Defendants have intentionally
18 appropriated Kellytoy's Squishmallow Trade Dress with the intent of causing
19 confusion, mistake, and deception as to the source of their goods and with the intent
20 of palming off their goods as those of Kellytoy and to place others in the position to
21 palm off their goods as those of Kellytoy. Defendants have thus committed unfair
22 competition under the common law of the State of California.

23 80. By their actions in infringing Kellytoy's Squishmallow Trade Dress,
24 Defendants are improperly trading upon the reputation and good will of Kellytoy
25 and are impairing Kellytoy's valuable rights in its Squishmallow Trade Dress.

26 81. Upon information and belief, said activities of Defendants alleged
27 herein were and are willful and intentional acts of unfair competition.

28 82. Kellytoy has no adequate remedy at law. Thus said activities of

1 Defendants have caused, if not enjoined, will continue to cause irreparable harm and
2 damage to the rights of Kellytoy in its Squishmallow Trade Dress and to its business
3 reputation and good will.

4 83. Upon information and belief, Defendants have engaged in their
5 unlawful conduct alleged herein intentionally, maliciously, fraudulently and
6 oppressively entitling Kellytoy to punitive damages in an amount to be determined
7 at trial.

8 **FIFTH CAUSE OF ACTION**

9 **(California Statutory Unfair Competition –**
10 **California Bus. & Prof. Code § 17200, *et seq.*)**

11 (Against all Defendants)

12 84. Kellytoy repeats and re-alleges each and every allegation of paragraphs
13 1 through 52, 64 through 68, 73 through 75, and 77 through 80, as though fully set
14 forth herein.

15 85. By reason of the foregoing, Defendants have been, and are, engaged in
16 “unlawful, unfair or fraudulent business practices” in violation of California
17 Business and Professional Code Section 17200 *et seq.*

18 86. Said activities of Defendants have caused and, if not enjoined, will
19 continue to cause irreparable harm and damage to the rights of Kellytoy in its
20 Squishmallow Trade Dress and to its business reputation and good will. Kellytoy
21 has no adequate remedy at law for these wrongs and injuries. The damage to
22 Kellytoy includes harm to its goodwill and reputation in the marketplace that money
23 cannot compensate. Accordingly, Kellytoy is entitled to a preliminary and
24 permanent injunction restraining and enjoining Defendants’ and their agents,
25 servants, and employees, and all persons acting thereunder, in concert with, or on
26 their behalf, from using Kellytoy’s Squishmallow Trade Dress, or any colorable
27 imitation or variation thereof, in connection with the sale and/or marketing of any
28 products. Kellytoy is further entitled to restitutionary disgorgement of all of

1 Defendants' ill-gotten gains pursuant to California Business and Professions Code §
2 17203 and to recover its costs and attorneys' fees incurred in bringing and
3 prosecuting this action.

4
5 **PRAYER FOR RELIEF**

6 WHEREFORE, Kellytoy prays for judgment against Defendants as follows:

7 1. That Defendants, their officers, members, directors, agents, servants,
8 employees, successors, licensees, representatives, successors, assigns, and all
9 persons acting in concert or participation with them, be permanently enjoined and
10 restrained from:

- 11 (i) Manufacturing, importing, distributing, advertising, offering to
12 sell or selling the Infringing Plush or any colorable imitations of
13 the Squishmallow Designs and/or Squishmallow Trade Dress;
14 (ii) Using the Squishmallow Trade Dress or any confusingly
15 similar trade dress in connection with plush or other toys;
16 (iii) Using the Squishmallow Trade Dress, or any confusingly
17 similar mark, in connection with the advertisement, offer to sell
18 or sale of any toy products;
19 (iv) Using any false designation of origin, or representing or
20 suggesting directly or by implication that Defendants, or any
21 brands or other sources identifiers created by Defendants, or
22 their toys, are affiliated with, associated with, authorized by, or
23 otherwise connected to Kellytoy, or that Defendants are
24 authorized by Kellytoy to use the Squishmallow Trade Dress or
25 Squishmallow Designs;
26 (v) Copying, distributing, displaying or making derivative works of
27 the Squishmallow Designs;
28 (vi) Engaging in any other activity constituting unfair competition

1 with Kellytoy, or constituting infringement of the
2 Squishmallow Trade Dress or Squishmallow Designs; and
3 (vii) Assisting, aiding, or abetting any other person or business entity
4 in engaging or performing any of the activities referred to in
5 subparagraphs (i) through (vi) above, or effecting any
6 assignments or transfers, forming new entities or associations,
7 or utilizing any other device for the purpose of circumventing
8 or otherwise avoiding the prohibitions set forth in
9 subparagraphs (i) through (vi) above.

10 2. That Defendants be directed to file with the Court and serve on
11 Kellytoy, within thirty (30) days after entry of a final injunction, a report in writing
12 under oath setting forth in detail the manner and form in which Defendants have
13 complied with the injunction.

14 3. That the Court direct any third parties providing services to
15 Defendants in connection with any infringing and/or enjoined conduct, including
16 social media platforms (*e.g.*, Instagram, Facebook, Twitter), online marketplaces
17 (*e.g.*, Alibaba, eBay, Etsy, AliExpress, Amazon, Taobao), online payment
18 providers, including credit card companies (*e.g.*, PayPal, Visa) and other service
19 providers (*e.g.*, Google, GoDaddy, LiveChat, Shopify) to cease providing services
20 to Defendants in connection with the offer for sale and sale of the Infringing Plush
21 or any other products using or embodying the Squishmallow Trade Dress or
22 Squishmallow Designs.

23 4. That Defendants be required to pay Kellytoy such damages as it has
24 sustained as a consequence of Defendants' infringement of the of the Squishmallow
25 Trade Dress and trebling of those damages under 15 U.S.C. § 1117;

26 5. Adjudge that each of the Defendants, by its unauthorized use of
27 Kellytoy's the Squishmallow Trade Dress for plush toys, and such other acts as it
28 may have undertaken relating to the Squishmallow Trade Dress, have violated

1 Kellytoy's rights under 15 U.S.C. § 1125(a), under California state law (including,
2 without limitation, Cal. Bus. & Prof. Code § 17200 *et seq.*), and under common law,
3 and that they have done so willfully and for the purpose of violating Kellytoy's
4 rights and damaging Kellytoy's goodwill and reputation in the Squishmallow Trade
5 Dress;

6 6. Direct Defendants to provide Kellytoy with an identification in writing
7 of any and all entities that are presently using the Squishmallow Designs and/or
8 Squishmallow Trade Dress in the United States on Defendants' behalf and inform
9 them that they must immediately cease such use;

10 7. Direct Defendants to immediately recall any and all merchandise
11 previously provided to any United States entity under the Squishmallow Trade
12 Dress or Squishmallow Designs;

13 8. Enter an order, pursuant to 15 U.S.C § 1118, directing Defendants to
14 deliver for destruction all products, brochures, marketing materials, decals, stickers,
15 signs, prints, packages, receptacles, wrappers, boxes, and advertisements in their
16 possession or under their control, bearing any unauthorized copy of any of the
17 Squishmallow Trade Dress, or any simulation, reproduction, counterfeit, copy,
18 confusingly similar likeness, or colorable imitation thereof, and all plates, molds,
19 matrices, programs and other means of making same;

20 9. Enter an order, pursuant to 17 U.S.C. § 503(a), impounding all of
21 Defendants' products that infringe Kellytoy's copyrights in the Squishmallow
22 Designs, as well as any plates, molds, matrices, programs, or other articles by means
23 of which copies of the works embodied in the Squishmallow Designs may be
24 produced;

25 10. Enter an order, pursuant to 17 U.S.C § 503(b), requiring the destruction
26 of all copies of Defendants' products that infringe Kellytoy's copyright in the
27 Squishmallow Designs, as well as any plates, molds, matrices, programs, or other
28 articles by means of which copies of the works embodied in the Squishmallow

1 Designs may be produced;

2 11. That each Defendant provide Kellytoy in writing with the following
3 information relating to Defendants' goods marketed, advertised, offered for sale, or
4 sold under the Squishmallow Trade Dress or Squishmallow Designs:

5 (i) the name, address and telephone number of each and every United
6 States entity to whom Defendants have made available or otherwise
7 provided any such products; and

8 (ii) a full accounting as to the precise dollar amount of such products made
9 available or provided and the profits recognized by Defendants in
10 connection with such actions;

11 12. Direct Defendants to pay the costs of corrective advertising;

12 13. Direct Defendants to pay Plaintiffs' attorneys' fees and costs incurred
13 in initiating and prosecuting this action;

14 14. Direct Defendants to pay punitive damages and exemplary damages
15 according to proof;

16 15. That Kellytoy recover its actual damages, Kellytoy's lost profits, and
17 Defendant's profits arising from Defendants' conduct complained-of herein;

18 16. That the Court award enhanced profits and treble damages;

19 17. That Kellytoy be awarded statutory damages;

20 18. That Kellytoy be awarded interest, including pre-judgment
21 interest, on the foregoing sums;

22 19. That the Court direct such other actions as the Court may deem just and
23 proper to prevent the public from deriving the mistaken impression that any
24 products or services offered, advertised, or promoted by or on behalf of Defendants
25 are authorized by Kellytoy or related in any way to Kellytoy's products or services;

26 20. That Defendants be ordered to disgorge all of their ill-gotten gains
27 pursuant to California Business and Professions Code § 17203; and
28

⁴ Dated: August 24, 2018

By: /s/ Mark B. Mizrahi

KELLYTOY WORLDWIDE, INC.

DEMAND FOR JURY TRIAL

Plaintiffs hereby demand and request a trial by jury of all issues raised that are triable by jury.

Respectfully submitted,

Dated: August 24, 2018

WOLF, RIFKIN, SHAPIRO,
SCHULMAN & RABKIN, LLP

By: /s/ Mark B. Mizrahi
MARK B. MIZRAHI
MAX N. WELLMAN
Attorneys for Plaintiffs
KELLYTOY (USA), INC. and
KELLYTOY WORLDWIDE, INC.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. LA CV18-05399 JAK (AGRx)

Date February 7, 2019

Title Kellytoy USA, Inc., et al. v. Dan-Dee International, Ltd., et al.

Present: The Honorable JOHN A. KRONSTADT, UNITED STATES DISTRICT JUDGE

Andrea Keifer

Not Reported

Deputy Clerk

Court Reporter / Recorder

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

Not Present

Not Present

**Proceedings: (IN CHAMBERS) ORDER RE DEFENDANTS' MOTION TO DISMISS
(DKT. 24)**

I. Introduction

On June 15, 2018, Kellytoy (USA), Inc. and Kellytoy Worldwide, Inc. (collectively, “Kellytoy” or “Plaintiffs”) brought this action against Dan-Dee International, Ltd. (“Dan-Dee”), Rite Aid Corporation (“Rite Aid”) (collectively, “Defendants”) and Does 1-10. Dkt. 1. Kellytoy filed an amended complaint on August 24, 2018 (“FAC” (Dkt. 16)). The FAC presents five causes of action: (i) federal copyright infringement; (ii) federal trademark / trade dress infringement; (iii) common law trademark / trade dress infringement; (iv) California common law unfair competition; and (v) California statutory unfair competition.

On September 7, 2018, Defendants filed a motion to dismiss the FAC (“Motion” (Dkt. 24)). Plaintiffs filed an opposition, and Defendants filed a reply. Dkts. 32, 34. A hearing was held on the Motion on January 28, 2019, and the matter was taken under submission. Dkt. 37.

For the reasons stated in this Order, the Motion is **GRANTED IN PART AND DENIED IN PART**.

II. Factual Background

A. Parties

Kellytoy develops, manufactures and sells children’s toys, including a line of plush toys that are marketed and sold under the SQUISHMALLOW brand (“Squishmallows”). FAC ¶¶ 6, 11, 18. Dan-Dee also manufactures and sells children’s toys, including plush toys. *Id.* ¶ 13. Rite Aid sells merchandise at its retail stores, including plush toys bearing third-party trademarks and under its own label, RITE STUFF. *Id.* ¶ 15. Dan-Dee has produced and sold to Rite Aid certain plush toys that allegedly infringe Kellytoy’s intellectual property rights. *Id.* ¶¶ 7, 41, 42.

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B. Trade Dress Infringement Allegations

1. Squishmallow Trade Dress

Kellytoy began developing its Squishmallows line of plush toy designs in 2016. *Id.* ¶ 21. Since that time, it has made substantial financial investments to develop, advertise and promote these product designs throughout the United States. *Id.* ¶ 22. The FAC alleges that “[d]ue to Kellytoy’s unique design, extensive marketing efforts, media coverage, and market penetration, the Squishmallow Trade Dress has acquired distinctiveness in the marketplace when applied to plush toys,” and “the relevant consuming public has come to recognize and associate plush toys bearing the Squishmallow Trade Dress as high quality goods connected with or offered by a single source, Kellytoy.” *Id.* ¶ 25. The FAC alleges that “[t]he Squishmallow Trade Dress is non-functional.” *Id.* ¶ 64.

The FAC alleges that the Squishmallow trade dress includes the following non-exhaustive list of features:

(1) substantially bell-shaped plush toys embodying fanciful renditions of animals/characters, (2) embroidered anime-inspired minimalist, whimsical facial features, (3) a velvety velour-like textured exterior, and (4) stuffing with a light “marshmallow,” memory foam-like texture.

Id. ¶ 23. It is also alleged that the Squishmallow trade dress is “more fully depicted” in the images attached to the FAC and reproduced below. *Id.*; Ex. 1 to FAC.

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Squishmallow Designs



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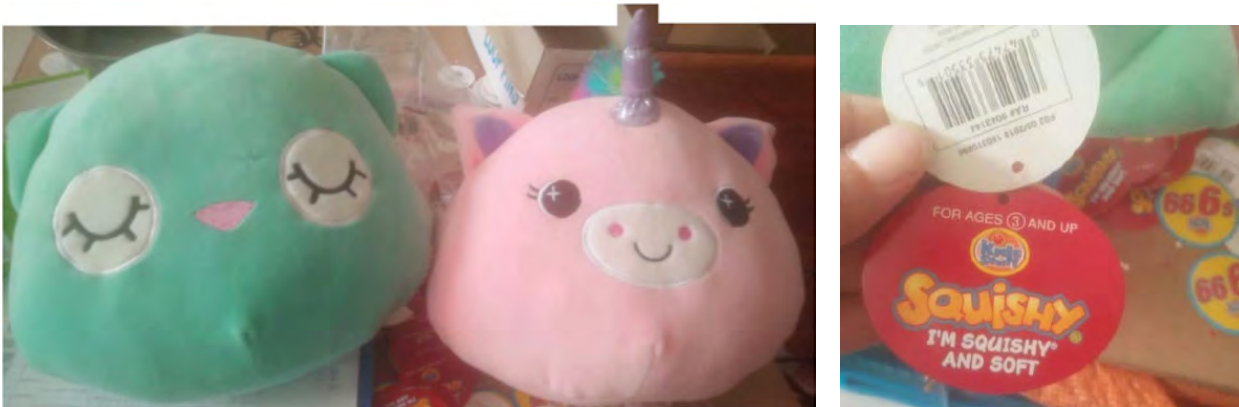
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2. Allegedly Infringing Product

In spring 2018, Dan-Dee entered an agreement with Rite Aid, which called for the production and sale of various plush toys that would be distributed in Rite Aid stores in the United States. FAC ¶ 41. The FAC alleges that these plush toys feature “substantially similar” designs to the Squishmallows. *Id.* The FAC further alleges that, because Dan-Dee’s plush toys are of lesser quality than the Squishmallows, they are sold at lower prices. *Id.* ¶ 44.

In 2017, Kellytoy met with representatives of Rite Aid, and showed the Rite Aid representatives its Squishmallows line of products. *Id.* 45. The FAC states that “Kellytoy suspects that Rite Aid submitted Kellytoy’s bid, together with facsimiles of the designs, to defendant Dan-Dee to obtain a competing bid from Dan-Dee for copies thereof.” *Id.* The FAC also alleges that “Defendants repurposed one of Dan-Dee’s numerous old trademarks, i.e. SQUISHY, used in the past on very different plush toys for use in connection with the Infringing Plush.” *Id.* ¶ 49. It is alleged that the designs of Dan-Dee’s plush toys “are confusingly similar to the Squishmallow Trade Dress.” *Id.* ¶ 67. Photographs of Dan-Dee’s plush toys are attached to the FAC and reproduced below. *Id.* ¶ 41; Ex. 6 to FAC.



C. Allegations as to Copyright Infringement

Kellytoy holds copyrights in the Squishmallow designs. FAC ¶¶ 24, 54. The unicorn Squishmallow design is registered with the U.S. Copyright Office under registration numbers VA0002096020 and VA0002093075. *Id.* ¶ 56. The FAC alleges that the Squishmallow designs are original works, each of which was created by or assigned to Kellytoy. *Id.* ¶¶ 54-56.

The FAC alleges that Defendants had access to the Squishmallow designs prior to Defendants’ development and distribution of their unicorn plush toy. *Id.* ¶ 54. The FAC further alleges that Defendants copied the design from the Squishmallow unicorn to create their competing product. *Id.* It is alleged that Defendants infringed Kellytoy’s exclusive rights to the Squishmallow unicorn design in connection with Defendants’ production, promotion and sale of a similar unicorn plush toy. *Id.* ¶¶ 57-58. A photograph of Dan-Dee’s unicorn plush toy is attached to the FAC and reproduced below, next to images of the Squishmallow unicorns. *Id.* ¶ 57; Ex. 7 to FAC.

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III. Request for Judicial Notice

Defendants request judicial notice of three documents in connection with the Motion (“Request” (Dkt. 24-1)). Each document is a printout of a portion of a publicly available website that features images of third-party products. Exhibit A is a printout from the website Instagram.com. Exhibits B and C are printouts accessed from archive.org, or the “Wayback Machine.” Pursuant to Fed. R. Evid. 201, a court may take judicial notice of facts that are either (1) “generally known within the trial court’s territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b).

Defendants seek judicial notice “of the existence of the three third party products discussed in their motion to dismiss, namely Pusheen, Sumikko Gurashi, and Squishable Pig.” Dkt. 24-1 at 2. It appears that Defendants also seek judicial notice of the fact that each third-party product “existed and w[as] public[ly] available at least as early as the dates shown” on the corresponding printout. *Id.* Plaintiffs object to the Request on three grounds: (i) the documents have not been authenticated; (ii) they do not come from a reliable source; and (iii) they are irrelevant to the issues presented by the Motion. Dkt. 33.

The facts for which Defendants seek judicial notice are not generally known within this jurisdiction. In addition, there are sufficient concerns as to the authenticity of the documents that contain the information at issue. Moreover, the facts as to which the Request has been made are not material to the resolution of the Motion. For these reasons, the Request is **DENIED**.

IV. Analysis

A. Legal Standards

Fed. R. Civ. P. 8(a) provides that a “pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief.” The complaint must state facts sufficient to show that a claim for relief is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The complaint need not include detailed factual allegations but must provide more than a “formulaic recitation of the elements of a cause of action.” *Id.* at 555. “The plausibility

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standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant’s liability, it stops short of the line between possibility and plausibility of entitlement to relief.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal citations and quotation marks omitted).

Pursuant to Fed. R. Civ. P. 12(b)(6), a defendant may move to dismiss a complaint for failure to state a claim. Such a motion may be granted when the complaint lacks a cognizable legal theory or sufficient facts to support one. *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). In considering a motion to dismiss, the allegations of the challenged complaint are deemed true and must be construed in the light most favorable to the non-moving party. See *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). However, a court need not “accept as true allegations that contradict matters properly subject to judicial notice or by exhibit. Nor is the court required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008) (citing *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001)).

If a motion to dismiss is granted, the court should “freely give leave [to amend] when justice so requires.” Fed. R. Civ. P. 15(a)(2). Although this policy is to be applied “with extreme liberality,” *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001), allowing leave to amend is inappropriate in circumstances where litigants have failed to cure previously identified deficiencies, or where an amendment would be futile. See *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Allen v. City of Beverly Hills*, 911 F.2d 367, 374 (9th Cir. 1990).

B. Application

1. Copyright Infringement

a) Legal Standards

To establish copyright infringement, a plaintiff must show (i) “ownership of a valid copyright,” and (ii) “copying of constituent elements of the work that are original.” *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991); see also *Swirsky v. Carey*, 376 F.3d 841, 844 (9th Cir. 2004). The Ninth Circuit has recently clarified that the second element of copyright infringement involves two distinct components: “copying” and “unlawful appropriation.” *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1117 (9th Cir. 2018) (citing *Sid & Marty Krofft Television Productions, Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1164-65 (9th Cir. 1977)). Proof of copying is required because “independent creation is a complete defense to copyright infringement.” *Id.* (citing *Feist*, 499 U.S. at 345-46). Proof of unlawful appropriation is required because certain copying – including the reproduction of “ideas” or “concepts” used in the plaintiff’s work – is not prohibited by the Copyright Act. *Id.* (citing 17 U.S.C. § 102(b)).

The proof of copying and unlawful appropriation “involves fact-based showings that the defendant had ‘access’ to the plaintiff’s work and that the two works are ‘substantially similar.’” *Funky Films, Inc. v. Time Warner Entm’t Co.*, 462 F.3d 1072, 1076 (9th Cir. 2006) (quoting *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 481 (9th Cir. 2000)). Infringement may also be established by demonstrating that the alleged infringers violated any of the exclusive rights granted to copyright holders under 17 U.S.C. § 106. See *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1159 (9th Cir. 2007).

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The Ninth Circuit uses “a two-part test to determine whether two works are substantially similar: an extrinsic test and an intrinsic test.” *Jada Toys, Inc. v. Mattel, Inc.*, 518 F.3d 628, 637 (9th Cir. 2008). The history of the application of the substantial similarity tests has been described as follows:

As originally adopted in [*Krofft*], the extrinsic prong was a test for similarity of ideas based on external criteria; analytic dissection and expert testimony could be used, if helpful. The intrinsic prong was a test for similarity of expression from the standpoint of the ordinary reasonable observer, with no expert assistance. As it has evolved, however, the extrinsic test now objectively considers whether there are substantial similarities in both ideas and expression, whereas the intrinsic test continues to measure expression subjectively.

Id. (citations omitted). “The intrinsic test is left to the trier of fact.” *Benay v. Warner Bros. Entm’t*, 607 F.3d 620, 624 (9th Cir. 2010).

b) Application

The FAC alleges that Kellytoy holds registered copyrights in the Squishmallow unicorn designs. Registration of a copyright is prima facie evidence of the validity of the copyright. *Syntek Semiconductor Co. v. Microchip Tech. Inc.*, 307 F.3d 775, 781 (9th Cir. 2002); 17 U.S.C. § 410(c). The FAC also alleges that Defendants had access to the Squishmallow designs before Defendants’ developed and distributed their unicorn plush toy. It further alleges that Defendants copied the design for their unicorn plush toy from the Squishmallow unicorn. The FAC also includes images of the Squishmallow unicorns and of the Dan-Dee unicorn plush toy.

Defendants argue that these allegations are insufficient to state a claim for copyright infringement. They contend that Kellytoy was required, but failed to identify the specific similarit(ies) between the parties’ works. Defendants also argue that Kellytoy alleges copyright infringement as to an unprotectable idea, not as to a protectable expression. Defendants assert that, at most, Kellytoy would be entitled to “thin” copyright protection for the Squishmallow unicorn. However, Defendants argue that the Kellytoy and Dan-Dee designs are not “virtually identical” as required under that standard.

Kellytoy is not entitled to copyright protection for the idea of a unicorn plush toy “or to elements of expression that necessarily follow from the idea of such dolls,” such as “any similarity in expression resulting from either the [imagined] physiognomy of [unicorns] or from the nature of stuffed animals.” *Aliotti v. R. Dakin & Co.*, 831 F.2d 898, 901 (9th Cir. 1987). However, Kellytoy states that it does not claim protection for those ideas, but rather the particular expression of those ideas in the Squishmallow unicorn design. As shown by the photographs, the Squishmallow unicorn does not bear a strong resemblance to a “realistic” representation of a unicorn. Rather, it is an artistic interpretation of a unicorn character, the design of which required using creativity that resulted in variations from the traditional image of a unicorn. Accordingly, the Squishmallow unicorn design contains expressive elements that extend beyond pure protected ideas. Further, in light of the allegations of complete copying by Defendants and the inclusion of images of both parties’ designs in the FAC, it is not necessary that the FAC identify with particularity each alleged similarity between the works at the pleading stage.

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Construing the allegations in the light most favorable to Kellytoy, the FAC states a plausible claim for copyright infringement. The FAC presents allegations that, if assumed to be true, would be sufficient to establish all of the following: (i) ownership of a valid copyright; (ii) copying; and (iii) unlawful appropriation. For the foregoing reasons, the Motion is **DENIED** as to the copyright cause of action.¹

2. Trademark Infringement

a) Legal Standards

“Trade dress refers generally to the total image, design, and appearance of a product and ‘may include features such as size, shape, color, color combinations, texture or graphics.’” *Clicks Billiards, Inc. v. Sixshooters, Inc.*, 251 F.3d 1252, 1257 (9th Cir. 2001) (quoting *Int’l Jensen, Inc. v. Metrosound U.S.A., Inc.*, 4 F.3d 819, 822 (9th Cir. 1993)). To prove trade dress infringement, “a plaintiff must demonstrate that (1) the trade dress is nonfunctional, (2) the trade dress has acquired secondary meaning, and (3) there is a substantial likelihood of confusion between the plaintiff’s and defendant’s products.” *Art Attacks Ink, LLC v. MGA Entm’t Inc.*, 581 F.3d 1138, 1145 (9th Cir. 2009) (citing *Disc Golf Ass’n v. Champion Discs*, 158 F.3d 1002, 1005 (9th Cir. 1998)).

Under the traditional definition of functionality, “a product feature is functional if it is essential to the use or purpose of the article or if it affects the cost or quality of the article.” *Moldex-Metric, Inc. v. McKeon Prod., Inc.*, 891 F.3d 878, 881 (9th Cir. 2018) (citations omitted). The “[f]unctional features of a product are features which constitute the actual benefit that the consumer wishes to purchase, as distinguished from an assurance that a particular entity made, sponsored, or endorsed a product.” *Id.* at 881-82. “[I]n evaluating functionality as well as the other elements of a trade dress claim, it is crucial that [courts] focus not on the individual elements, but rather on the overall visual impression that the combination and arrangement of those elements create.” *Clicks Billiards*, 251 F.3d at 1259.

The Ninth Circuit has identified four factors as significant in assessing functionality: “(1) whether the design yields a utilitarian advantage, (2) whether alternative designs are available, (3) whether advertising touts the utilitarian advantage of the design, and (4) whether the particular design results from a comparatively simple or inexpensive method of manufacture.” *Disc Golf Ass’n, Inc. v. Champion Discs, Inc.*, 158 F.3d 1002, 1006 (9th Cir. 1998). In addition to these four factors, courts inquire “whether protection of the feature as a trademark would impose a significant non-reputation-related competitive disadvantage.” *Au-Tomotive Gold, Inc. v. Volkswagen of Am., Inc.*, 457 F.3d 1062, 1072 (9th Cir. 2006).

The Ninth Circuit has described the framework for functionality as a two-part test. See *Millennium Labs., Inc. v. Ameritox, Ltd.*, 817 F.3d 1123, 1128-29 (9th Cir. 2015) (“[T]he test for functionality proceeds in two steps.”) (quoting *Au-Tomotive Gold*, 457 F.3d at 1072). At “Step One,” courts apply the *Disc Golf* factors to determine whether the asserted trade dress is “essential to the use or purpose of the article [or] affects [its] cost or quality.” *Id.* at 1129; see also *TrafFix Devices, Inc. v. Marketing*

¹ This is not a final determination as to the validity or scope of the claimed copyrights, or whether the Dan-Dee design is infringing. These issues concern fact-based matters that were not presented through the Motion.

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Displays, Inc., 532 U.S. 23, 32-33 (2001). “If the claimed trade dress is determined to be functional under Step One, then ‘the inquiry is over.’” *Millennium Labs.*, 817 F.3d at 1129 (quoting *Au-Tomotive Gold*, 457 F.3d at 1072). If not, the analysis proceeds to “Step Two,” which addresses whether trade dress protection would impose a significant non-reputation-related competitive advantage. *Id.*

b) Application

Defendants argue that Kellytoy’s claimed trade dress is described insufficiently through vague allegations in the FAC. Consequently, they contend that the allegations are not sufficient to provide notice of the claim. They assert that the description in the FAC is “so vague that the alleged trade dress covers nearly the entire market for anime-inspired plush toys.” Dkt. 34 at 3. Defendants further argue that, because the claimed trade dress is functional, it is not eligible for trade dress protection. Defendants acknowledge that the FAC contains a conclusory pleading of non-functionality, but contend that is inadequate under the applicable standards absent more specific factual allegations.

Kellytoy responds that the written description of its trade dress in the FAC must be read in light of the attached images, and that together they provide a sufficient description. Kellytoy adds that it is not required to plead non-functionality of its claimed trade dress, although it claims to have done so.

Kellytoy is correct that “pictures of a product combined with a list of the elements of the trade dress” can be sufficient to put defendants on notice as to the claimed trade dress. See Dkt. 32 at 19 n.4. However, the mere presence of pictures and a written list is not *per se* sufficient, and must be evaluated on a case-by-case basis. The written description of the claimed trade dress in the FAC does not provide sufficient specificity as to the nature and scope of Kellytoy’s claim. It states that the claimed trade dress

includes, without limitation: (1) substantially bell-shaped plush toys embodying fanciful renditions of animals/characters, (2) embroidered anime-inspired minimalist, whimsical facial features, (3) a velvety velour-like textured exterior, and (4) stuffing with a light “marshmallow,” memory foam-like texture.

FAC ¶ 23.

This general description offers little insight into the scope or nature of Kellytoy’s claim. In addition, the written description in the FAC can reasonably be construed as substantially broader than the trade dress protection Kellytoy actually seeks. It is also too broad to form the basis of a plausible claim for trade dress infringement.

Kellytoy argues that any ambiguities in its written description are “answered by reference to the images of the products at issue.” Dkt. 32 at 19. However, in light of the substantial differences among the designs of the products in the Squishmallows line, the images included in the FAC do not provide the level of clarity about the nature and scope of the claimed trade dress as is required by the caselaw. The images do not sufficiently show or explain what about the design of the Squishmallows is claimed as the basis for trade dress protection. Accordingly, the cause of action for federal trademark infringement is not pleaded sufficiently.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. LA CV18-05399 JAK (AGRx)

Date February 7, 2019

Title Kellytoy USA, Inc., et al. v. Dan-Dee International, Ltd., et al.

There has been no showing that any amendment to the Complaint would be futile. In light of the well accepted principle that leave to amend should be freely given, it is appropriate to do so here. This outcome is confirmed by the representations in the Opposition to the Motion and at the hearing that Kellytoy can provide a more detailed statement in support of its trade dress allegations. See *id.* at 26-27.

For the foregoing reasons, the Motion is **GRANTED** without prejudice as to the federal trademark infringement causes of action.

3. Remaining Causes of Action

Defendants assert that the third, fourth and fifth causes of action are derivative of the federal trademark causes of action and should be dismissed for the same reasons. Kellytoy did not respond to this argument in its brief or at the hearing.

The third, fourth and fifth causes of action arise from the same underlying allegations of trade dress infringement. Therefore, a parallel analysis to what has been stated above applies to these causes of action. See *Cleary v. News Corp.*, 30 F.3d 1255, 1262-63 (9th Cir. 1994); *First Brands Corp. v. Fred Meyer, Inc.*, 809 F.2d 1378, 1381 (9th Cir. 1987). Therefore, the Motion is **GRANTED** without prejudice as to the third, fourth and fifth causes of action.

V. Conclusion

For the reasons stated in this Order, the Motion is **GRANTED IN PART AND DENIED IN PART**. The Motion is **DENIED** as to the first cause of action. The Motion is **GRANTED** as to the second through fifth causes of action. Any amended complaint shall be filed no later than February 21, 2019.

IT IS SO ORDERED.

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA – WESTERN DIVISION

KELLYTOY (USA), INC., a California
corporation; and KELLYTOY
WORLDWIDE, INC., a California
corporation;

Plaintiffs,

vs.

DAN-DEE INTERNATIONAL, LTD.,
a Delaware corporation; RITE AID
CORPORATION, a Delaware
corporation, and DOES 1 through 10,
inclusive,

Defendants.

Case No. 2:18-cv-05399 JAK (AGRx)

**SECOND AMENDED COMPLAINT
FOR:**

- 1. FEDERAL COPYRIGHT
INFRINGEMENT (17 U.S.C.
§ 501);**
- 2. FEDERAL TRADEMARK
INFRINGEMENT, FALSE
DESIGNATION OF ORIGIN
AND FALSE DESCRIPTION
(15 U.S.C. § 1125);**
- 3. COMMON LAW TRADEMARK
INFRINGEMENT;**
- 4. CALIFORNIA COMMON LAW
UNFAIR COMPETITION; AND**
- 5. CALIFORNIA STATUTORY
UNFAIR COMPETITION.**

DEMAND FOR JURY TRIAL

Plaintiffs KELLYTOY (USA), INC., a California corporation and
KELLYTOY WORLDWIDE, INC., a California corporation (collectively,
“Kellytoy”) bring this action against defendant DAN-DEE INTERNATIONAL,
LTD., a Delaware corporation (“Dan-Dee”), RITE AID CORPORATION, a
Delaware corporation (“Rite Aid”), and DOES 1 through 10 (collectively,

1 “Defendants”) for injunctive relief and damages under the laws of the United States
2 and the State of California as follows:

3 **JURISDICTION AND VENUE**

4 1. This action arises under the copyright laws of the United States, 17
5 U.S.C. § 101 *et seq.*, the trademark laws of the United States, 15 U.S.C. § 1125(a),
6 and under the statutory and common law of trademark/trademark infringement and
7 unfair competition.

8 2. This Court has jurisdiction under 28 U.S.C. §§ 1331, 1338, and 1367,
9 and 15 U.S.C. §§ 1116, 1117, 1121, and 1125.

10 3. Venue lies in this judicial district pursuant to 28 U.S.C. § 1391 and
11 1400(a).

12 4. This Court has personal jurisdiction over Defendants, as Defendants are
13 doing business in California and this District and are subject to the jurisdiction of
14 this Court. Indeed, defendant Dan-Dee actively distributes plush toys throughout
15 the state of California and this District. Similarly, defendant Rite Aid has numerous
16 retail stores within the state of California and this District. In addition, defendants
17 Dan-Dee and Rite Aid knowingly infringed on Kellytoy’s copyrights and trade
18 dress, knowing that Kellytoy is a California resident, and thereby purposefully
19 directed their activities towards California.

20 **NATURE OF THE ACTION**

21 5. This is an action for copyright infringement under the Copyright Act,
22 17 U.S.C. §§ 101, *et seq.*; and trade dress infringement, trademark infringement,
23 unfair competition and false designation of origin under the Lanham Act, 15 U.S.C.
24 § 1125(a), California Bus. & Prof. Code § 17200, *et seq.*, and the common law.

25 6. Kellytoy’s SQUISHMALLOW branded plush toys (“Squishmallows”)
26 – representative samples of which are depicted in **Exhibit 1** hereto – are one of the
27 world’s hottest plush toy lines. Kellytoy’s Squishmallows feature a highly
28 distinctive and widely recognized trade dress, which Kellytoy pioneered and

1 created. Kellytoy actively markets its Squishmallows through numerous media
2 outlets, including, without limitation, on social media, at tradeshow, through
3 Squishmallows.com, amazon.com, walmart.com, walgreens.com and target.com,
4 and on Kellytoy's website, depicting images of its proprietary Squishmallows line of
5 plush toys.

6 7. The explosion in popularity of Kellytoy's Squishmallows and the
7 resulting and widespread customer and industry recognition, has unfortunately led to
8 illegal imitation by Kellytoy's competitors. Indeed, Kellytoy has discovered that
9 defendant Dan-Dee has been manufacturing and offering for sale to Rite Aid, which
10 Rite Aid has re-sold, numerous units of two knock-off products for distribution
11 within this state and district that both infringe upon Kellytoy's trade dress and one
12 of which infringes upon Kellytoy's copyrighted design in its Squishmallows.

13 8. Accordingly, to prevent and remediate the rampant consumer confusion
14 and misappropriation of Kellytoy's copyrighted designs in its Squishmallows
15 resulting from Defendants' unauthorized use, promotion and sale of the Infringing
16 Plush (defined below), and to compensate Kellytoy for its injuries, Kellytoy seeks
17 immediate and permanent injunctive relief, compensatory damages, disgorgement of
18 Defendants' profits, statutory damages, punitive damages, Kellytoy's reasonable
19 attorneys' fees and expenses, a product recall, and corrective advertising sufficient
20 to address Defendants' wrongdoing.

21 **THE PARTIES**

22 9. Kellytoy (USA), Inc. is a California corporation with its principal place
23 of business located in Los Angeles, California.

24
25 10. Kellytoy Worldwide, Inc. is a California corporation with its principal
26 place of business located in Los Angeles, California.

27 11. Kellytoy is in the business of developing, manufacturing and selling
28 children's toys including, among other things, plush toys.

1 12. On information and belief, defendant Dan-Dee International, LTD.
2 (“Dan-Dee”) is a Delaware corporation with a place of business in New Jersey.

3 13. Dan-Dee is in the business of manufacturing and selling children's toys
4 including, among other things, plush toys.

5 14. On information and belief, defendant Rite Aid Corporation (“Rite
6 Aid”) is a Delaware corporation with a place of business in Pennsylvania and
7 numerous stores in this judicial district.

8 15. Rite Aid owns and operates drug stores and pharmacies throughout the
9 United States and, on information and belief, this District that sell various
10 merchandise, including plush toys bearing third-party trademarks and under its own
11 private label, RITE STUFF.

12 16. The true names and capacities of defendants sued herein as DOES 1-
13 10, inclusive, are unknown to Kellytoy, who therefore sues said defendants by such
14 fictitious names. Kellytoy will amend this Complaint to allege their true names and
15 capacities when the same are ascertained.

16 17. Upon information and belief, at all relevant times mentioned in this
17 Complaint, Defendants, and each of them, were acting in concert and active
18 participation with each other in committing the wrongful acts alleged herein, and
19 were the agents of each other and were acting within the scope and authority of that
20 agency and with the knowledge, consent and permission of one another.

21 **BACKGROUND FACTS**

22 **Kellytoy and Its Protected Intellectual Property Rights**

23 18. Kellytoy is an innovative and highly successful creator, manufacturer,
24 distributor and seller of unique plush toys, including, without limitation, its
25 Squishmallows line of plush under the SQUISHMALLOW brand. (*See, e.g.,*
26 **Exhibit 1.**)

27 19. Kellytoy has been in business for approximately 35 years and in that
28 time has developed a reputation for producing high quality, unique, creative and

1 innovative plush toys that are highly prized in the industry.

2 20. Kellytoy devotes extensive time and resources promoting and
3 preserving its image identity and the image and identity of its high quality plush
4 toys, including by creating distinctive designs and marks for use on its products and
5 seeking U.S. trademark and copyright registrations for such designs and marks,
6 including those at issue in this Complaint.

7 21. In 2016, Kellytoy conceived of and began creating its Squishmallows
8 line of plush toy designs – ultimately marketed in connection with the
9 SQUISHMALLOW trademark – that share common, unique features that
10 distinguish them from the goods of others. These designs are wholly original to
11 Kellytoy and comprise copyrightable subject matter under the laws of the United
12 States.

13 22. Indeed, Kellytoy has been and is the sole owner of all right, title and
14 interest in and to the copyrights in the individual “characters” in the Squishmallows
15 line and the distinguishing, unique, and recognizable features that are common
16 across the Squishmallows line. From 2016 to the present, Kellytoy has expended
17 large sums of money in developing, advertising and promoting these product
18 designs through the United States. In fact, Kellytoy is spending approximately
19 \$50,000 per month in direct to consumer and business-to-business advertising in
20 connection with its SQUISHMALLOW branded goods.

21 23. Kellytoy sells a broad range of SQUISHMALLOW branded plush toys
22 featuring the brand’s iconic trade dress, and whose overall look, feel and image –
23 and in particular but without limitation its shapes, colors, textures and graphics –
24 serve as a distinctive source identifier to the consuming public. Though not easily
25 reduced to writing, these features include: (1) substantially egg/bell shaped plush
26 toys depicting various similarly shaped fanciful renditions of animals/characters; (2)
27 simplified Asian style Kawaii faces with repeating and complementary rounded/oval
28 shaped graphics depicting features on the characters themselves (such as eyes,

1 snouts and bellies) and which conform to and support the overall egg/bell shape of
2 the toys; (3) embroidered two-dimensional facial features, such as eyes, nostrils,
3 mouths; (4) distinctive contrasting and non-monochrome coloring; and (5) short-pile
4 velvety velour-like textured exterior with a light and silky memory foam-like
5 stuffing providing an extremely soft and squeezable marshmallow feel. These
6 features, and the resulting overall look and feel of these toys, are more fully
7 depicted, without limitation, in **Exhibit 1** hereto – features common to Kellytoy’s
8 line of Squishmallows (collectively together with **Exhibit 1** the “Squishmallow
9 Trade Dress”).

10 24. The plush designs depicted in **Exhibit 2** – a subset of Kellytoy’s line of
11 Squishmallows – comprise some of Kellytoy’s most popular Squishmallows, which
12 were created by or assigned to Kellytoy (the “Squishmallow Designs”). As
13 explained in greater detail below, these Squishmallow Designs are the subject of
14 Copyright Registrations issued by the United States Copyright Office, pursuant to
15 17 U.S.C. §101 *et seq.*

16 25. Continuously and without interruption, beginning in 2016, Kellytoy has
17 expended a great deal of time, effort, and money in the promotion of its
18 Squishmallows. And due to Kellytoy’s unique design, robust marketing efforts,
19 media coverage, and market penetration, the Squishmallow Trade Dress has
20 acquired distinctiveness in the marketplace when applied to plush toys. Indeed,
21 because of Kellytoy’s extensive promotional activities and widespread display of its
22 Squishmallows directed to the public, and as a consequence of Kellytoy’s fair and
23 honorable dealings with its customers, the relevant consuming public has come to
24 recognize and associate plush toys bearing the Squishmallow Trade Dress as high
25 quality goods connected with or offered by a single source, Kellytoy. The
26 Squishmallow Trade Dress has valuable goodwill and consumer recognition
27 associated with it and has come to symbolize the valuable goodwill and reputation
28 of Kellytoy.

1 26. In addition to being original and inherently distinctive, the
2 Squishmallow Trade Dress is widely recognized by consumers. A simple Internet
3 search using the Google search engine yields about 1,140,000 "hits" for the search
4 term "Squishmallows."

5 27. In addition to marketing and selling them through thousands of retail
6 stores nationwide, Kellytoy markets and sells its Squishmallows on its website
7 <squishmallows.com> featuring dozens of copyright-protected photographs of its
8 plush toys and models holding its Squishmallows. Copies of the homepage and
9 other representative pages from <squishmallows.com> are attached as **Exhibit 3**.

10 28. Further adding to their recognizability and secondary meaning in the
11 marketplace, Squishmallows have been featured in numerous magazines, press
12 articles, reviews, and videos, as set forth in greater detail in **Exhibit 4** hereto,
13 including many mainstream media outlets such as the *Washington Post*, the *Chicago*
14 *Tribune*, the *Daily Harold*, *Okay! Magazine*, among others. By way of example
15 only, Squishmallows have been also recognized by The *Washington Post* and
16 *Consumer Reports* on their 2017 Holiday Gift Guides; *LA Parent* recognized
17 Squishmallows in its October 2017 issue, under the "Products We Love" section;
18 and, as depicted below, *OK! Magazine* featured Squishmallows in its August 21,
19 2017 issue, stating "Cuddly as they are cute, they make great couch pals, pillows
20 and bedtime buddies in any home. Collect the whole squad! squishmallows.com."



29. Kellytoy's Squishmallows have also been featured in the October 2017 issues of *L.A. Parent Magazine*, *City Parent Magazine*, and *San Diego Family Magazine* and included in the 2017 gift guides for various publications, including in *The Washington Post*, *The Houston Chronicle*, and *L.A. Parent*.

30. Kellytoy's Squishmallows have also been the subject of numerous industry awards and product recommendation lists, including by the National Parenting Product Awards, Parents' Choice, and TTPM, as more fully set out in **Exhibit 4**. In fact, Kellytoy's Squishmallows were named by *Toy Insider* as one of the "Top Holiday Toys," made the cover the September/October 2017 *Toy Book Magazine*, and have been featured in numerous other trade magazines, such as, *Teddy Bear and Friends Magazine* and *Animal Tales Magazine*.

31. Kellytoy's Squishmallows have also, as alleged above, been the subject of consistent and elaborate marketing campaigns, including email campaigns, social media posts, and direct to consumer advertising. Kellytoy's Squishmallows currently have nearly 44,300 Instagram followers, more than 60,000 Facebook

1 followers – more than many longer-existing and well-known plush brands. To its
2 followers, Kellytoy regularly publishes photographs of its Squishmallows. Many of
3 these followers, in turn, share these posts with their friends and social media
4 followers. A copy of Squishmallows Instagram page is attached as **Exhibit 5**.

5 32. In addition, hundreds of well-known YouTube influencers and vloggers
6 have shared and posted images and videos of themselves holding plush toys in
7 Kellytoy’s line of Squishmallows products. Tens of thousands of consumers have
8 done the same through numerous media platforms, including, Facebook, Instagram,
9 Pinterest and YouTube. These posts have generated millions of “likes” and
10 “shares.”

11 33. Squishmallows’ legion of loyal fans have been extremely engaged on
12 social media, including Facebook and Instagram, demonstrating their awareness and
13 affection for Kellytoy’s Squishmallows, with the average Squishmallows post likes
14 on Instagram hovering over 1000+ per post and 45-100 average comments per post.

15 34. Kellytoy’s Squishmallow website traffic has grown exponentially since
16 its launch in 2017 to an average of 4,313 visits per day.

17 35. Kellytoy’s Squishmallows are listed amongst the leading global brands
18 and toys such as Hatchimals, Hasbro, RB, Hot Wheels, NERF, and Spin Master by
19 several industry publications.

20 36. As a direct result of Kellytoy’s efforts at promoting and building its
21 brand, Kellytoy’s Squishmallows line has exploded in popularity, creating
22 substantial demand for and interest in Squishmallows, and generating enormous
23 goodwill in the Squishmallows brand and the Squishmallows Trade Dress in the
24 United States and around the world. In fact, Kellytoy’s Squishmallows are sold
25 through hundreds of retailers including some of the largest retailers in the country,
26 including, approximately 1000 Costco stores, 5,500 Walmart stores, 8,500
27 Walgreens stores, 4,000 Kroger supermarkets and Fred Meyer stores, 2000 Target
28

1 stores, 900 Party City stores, amongst other outfits such as Dave & Busters, Knotts
2 Berry Farms and numerous others.

3 37. Since the summer of 2017, Kellytoy has sold approximately a
4 whopping 22 million (22,000,000) units of Squishmallows with no indication that
5 sales will be slowing down anytime soon. Kellytoy's Squishmallows products
6 embodying the Squishmallows Trade Dress have yielded tens of millions of dollars
7 of sales in the U.S. over the past year.

8 38. In fact, Kellytoy's Squishmallows sold out through Walgreens.com
9 during their Gift of the Week promotion in early November 2017, as well as
10 exceeding all sales goals for the campaign, both online and in stores.

11 39. Because of Squishmallows' massive success and popularity, consumers
12 have come to associate Kellytoy's high-quality Squishmallows plush toys with the
13 Squishmallows Trade Dress and, conversely, have come to recognize the
14 Squishmallow Trade Dress as a designation of source.

15 **Defendants' Unlawful Conduct**

16 40. At the outset, none of the defendants to this action is licensed or
17 otherwise authorized by Kellytoy to market or distribute products bearing or
18 embodying Kellytoy's Squishmallow Designs and/or Squishmallow Trade Dress.

19 41. Upon information and belief, sometime in spring of 2018, notably well
20 after Kellytoy established its reputation in its Squishmallow Trade Dress, Defendant
21 Dan-Dee entered into an agreement with defendant Rite Aid to have Dan-Dee sell
22 and supply to Rite Aid various plush toys bearing substantially similar copies of
23 Kellytoy's Squishmallow Designs and Squishmallow Trade Dress (hereinafter
24 referred to as "Infringing Plush") for distribution by Rite Aid through its United
25 States stores. Photographs of the Infringing Plush bearing Dan-Dee and Rite Aid's
26 trademarks are collectively attached hereto as **Exhibit 6**.

27 42. Upon information and belief, Dan-Dee offered to sell the Infringing
28 Plush to Rite Aid in the United States, corresponded across state lines with Rite Aid

1 in the United States concerning the production, sale, and distribution of the
2 Infringing Plush, and transported the Infringing Plush to Rite Aid in interstate
3 commerce.

4 43. Upon information and belief, Defendants manufactured in, and
5 imported from, China a production run of the Infringing Plush into the United States
6 for the purpose of having the Infringing Plush enter interstate commerce and/or to
7 be transported or used in interstate commerce through the same channels of trade
8 through which Kellytoy sells its Squishmallows plush. Upon information and
9 belief, Rite Aid has indeed sold the Infringing Plush in interstate commerce.

10 44. Upon information and belief, Dan-Dee has agreed to sell the Infringing
11 Plush to Rite Aid at prices that were/are relatively lower than the prices charged by
12 Kellytoy for its Squishmallows plush. Kellytoy is informed and believes that Dan-
13 Dee is able to undercut Kellytoy's sales prices because, rather than investing in
14 creating its own designs and identity, Dan Dee has copied Kellytoy's proprietary
15 Squishmallow Designs and Squishmallow Trade Dress and because Defendants'
16 Infringing Plush are of inferior quality as compared to Kellytoy's
17 SQUISHMALLOW branded plush.

18 45. In fact, Kellytoy met with buyers from Rite Aid in 2017 during which
19 Kellytoy showed the buyers Kellytoy's Squishmallows line of products together
20 with pricing therefor, after which, Kellytoy suspects that Rite Aid submitted
21 Kellytoy's bid, together with facsimiles of the designs, to defendant Dan-Dee to
22 obtain a competing bid from Dan-Dee for copies thereof.

23 46. Kellytoy is informed and believes that Defendants, without Kellytoy's
24 consent or permission, intend to sell, advertise, promote, display, and distribute, toys
25 bearing Squishmallow Designs and Squishmallow Trade Dress in United States
26 commerce.

27 47. The activities of Defendants in copying, distributing, advertising,
28 selling, offering for sale and otherwise using the Squishmallow Trade Dress

1 embodied in the Infringing Plush – including by copying wholesale the shape and
2 look – constitute false designation of origin regarding sponsorship of those plush
3 toys and falsely represent to the public that Defendants' plush toys originate from
4 Kellytoy, and/or that Defendants' plush toys have been sponsored, approved or
5 licensed by Kellytoy, or in some way affiliated or connected with Kellytoy. Such
6 activities of Defendants are likely to confuse, mislead, and deceive Defendants'
7 customers, purchasers, and members of the public as to the origin of the toys bearing
8 the Squishmallow Trade Dress, or to cause such persons to believe that Defendants'
9 Infringing Plush and/or Defendants have been sponsored, approved, authorized, or
10 licensed by Kellytoy or in some way affiliated or connected with Kellytoy, all in
11 violation of 15 U.S.C. §1125(a).

12 48. Upon information and belief, the activities of Defendants were done
13 willfully with full knowledge of the falsity of such designations of origin and false
14 descriptions or representations, with the intent to trade on the enormous goodwill
15 Kellytoy has earned in its Squishmallows, and with the intent to cause confusion,
16 and to mislead and deceive the purchasing public into believing that the products
17 Defendants sell are directly sponsored by, authorized, by, associated with, or
18 originate from Kellytoy.

19 49. As further evidence of Dan-Dee's intent to trade upon Kellytoy's
20 goodwill in Kellytoy's Squishmallows line of plush toys, Defendants repurposed
21 one of Dan-Dee's numerous old trademarks, i.e. SQUISHY, used in the past on very
22 different plush toys for use in connection with the Infringing Plush.

23 50. Defendants, by their unauthorized copying and use of Kellytoy's
24 Squishmallow Designs and Squishmallow Trade Dress, have engaged and will
25 engage in acts of copyright infringement, unfair competition, unlawful
26 appropriation, unjust enrichment, wrongful deception of the purchasing public, and
27 unlawful trading on Kellytoy's good will and the public acceptance of Kellytoy's
28 original works. Defendants' activities have damaged and will continue to damage

1 the reputation, business and good will of Kellytoy nationally and in this judicial
2 district.

3 51. Upon information and belief, unless enjoined by the Court, Defendants
4 will continue and further escalate their infringing activities.

5 52. Kellytoy has no adequate remedy at law. Thus said activities of
6 Defendants have caused and, if not enjoined, will continue to cause irreparable,
7 immediate and impending harm and damage to Kellytoy's business, and to the
8 business, business reputation and good will of Kellytoy.

9 **FIRST CAUSE OF ACTION**

10 **(Federal Copyright Infringement -- 17 U.S.C. §501)**

11 (Against all Defendants)

12 53. Kellytoy repeats and realleges each and every allegation above as
13 though fully set forth herein.

14 54. Kellytoy owns a valid copyright in the Squishmallow Designs. The
15 Squishmallow Designs are original, decorative, and non-functional. After having
16 had access to Kellytoy's Squishmallow Designs, Defendants, without authorization
17 from Kellytoy, have designed, manufactured, distributed, advertised, offered for sale
18 and/or sold the Infringing Plush unicorn design depicted in **Exhibit 7** bearing a
19 design that Defendants copied from the Squishmallow Designs.

20 55. All of the Squishmallow Designs were originally created by Kellytoy
21 or were assigned to and are owned by Kellytoy.

22 56. The Squishmallow Designs comprise original works of authorship that
23 may be copyrighted under United States law. In fact, Kellytoy has complied with
24 requirements of Title 17 of the United States Code with respect to the registration of
25 Kellytoy's unicorn Squishmallow Designs depicted in **Exhibit 2**, as evidenced by
26 United States Copyright Registration Nos. VA0002096020 and VA0002093075,
27 entitling Kellytoy to the exclusive rights and privileges in and to the above-
28 referenced copyrights. These copyright registrations are valid and subsisting.

1 57. Defendants have imitated, displayed, reproduced, distributed, and/or
2 created derivative works from the subject matter embodied in the Squishmallow
3 Designs in connection with Defendants' manufacture, promotion, and solicitation
4 and acceptance of orders for the sale of Defendants' Infringing Plush unicorn design
5 depicted in **Exhibit 7**.

6 58. Defendants' acts are in violation of the exclusive rights of the copyright
7 holder to reproduce, distribute, display, and create derivative works from the
8 copyrighted Squishmallow Designs, as articulated in 17 U.S.C. § 106. Defendants
9 have thereby infringed Kellytoy's copyrights in the Squishmallow Designs.

10 59. Such activities and conduct has caused Kellytoy injury for which it is
11 entitled to recover under 17 U.S.C. § 504.

12 60. On information and belief, Defendants' infringing acts were committed
13 with knowledge or in reckless disregard of Kellytoy's exclusive rights in the
14 Squishmallow Designs.

15 61. On information and belief, as a result of Defendants' copyright
16 infringement, they have made substantial profits and gains to which they are not
17 entitled to retain.

18 62. As a direct and proximate result of Defendants' unlawful conduct,
19 Defendants have caused and will continue to cause irreparable injury to Kellytoy,
20 for which Kellytoy has no adequate remedy at law. Unless Defendants are
21 restrained by this Court from continuing their imitation, copying, display,
22 distribution, reproduction and creation of derivative works from the works
23 embodied in the copyrighted Squishmallow Designs, these injuries will continue to
24 occur. Accordingly, Kellytoy is entitled to preliminary and permanent injunctions
25 restraining Defendants' infringing conduct, pursuant to 17 U.S.C. § 502.

26
27
28

SECOND CAUSE OF ACTION

**(Trademark Infringement, False Designation of Origin and False Description --
15 U.S.C. §1125)**

(Against All Defendants)

63. Kellytoy repeats and realleges each and every allegation of paragraphs 1 through 52 above as if fully set forth herein.

64. The Squishmallow Trade Dress is non-functional and highly distinctive, and has become associated in the public mind with plush toy products of the highest quality and reputation finding their origin in a single source, Kellytoy.

65. Kellytoy owns all right, title and interest in and to the Squishmallow Trade Dress.

66. Without Kellytoy's authorization or consent, and having knowledge of Kellytoy's prior rights in the Squishmallow Trade Dress, Defendants have designed, manufactured, imported, distributed, advertised, offered for sale and/or sold and/or will soon commence importation, distribution, advertising, offers for sale, and sale of replicas of the Squishmallow Trade Dress to the consuming public in direct competition with Kellytoy, in or affecting interstate commerce.

67. The Infringing Plush designs are confusingly similar to the Squishmallow Trade Dress. Defendants' use of the Squishmallow Trade Dress has caused and, unless enjoined by this Court, will continue to cause a likelihood of confusion and deception of members of the public and, additionally, injury to Kellytoy's goodwill and reputation as symbolized by the Squishmallow Trade Dress.

68. Defendants' use and further threatened uses of the Squishmallow Trade Dress thus constitutes trade dress infringement, false designation of origin and unfair competition in violation of 15 U.S.C. § 1125(a).

69. As a direct and proximate result of Defendants' unlawful conduct, Defendants have misappropriated Kellytoy's rights in the Squishmallow Trade

1 Dress, as well as the goodwill associated therewith, and have diverted sales and
2 profits from Kellytoy to Defendants. Thus, as a direct and proximate result of
3 Defendants' acts of willful infringement, Kellytoy has suffered and/or will suffer
4 damage to its valuable brand and reputation, and other damages in an amount to be
5 proven at trial, including Defendants' profits and Kellytoy's lost profits.

6 70. Defendants' actions described above will cause, have caused, and will
7 continue to cause irreparable damage to Kellytoy, unless Defendants are restrained
8 by this Court. Kellytoy has no adequate remedy at law with regard to Defendants'
9 infringing conduct. Accordingly, Kellytoy is entitled to a preliminary and
10 permanent injunction, pursuant to 15 U.S.C. § 1116, restraining and enjoining
11 Defendants' and their agents, servants, and employees, and all persons acting
12 thereunder, in concert with, or on their behalf, from using Kellytoy's Squishmallow
13 Trade Dress, or any colorable imitation or variation thereof, in connection with the
14 sale and/or marketing of any products.

15 71. Defendants' aforesaid acts are exceptional within the meaning of 15
16 U.S.C § 1117.

17 **THIRD CAUSE OF ACTION**
18 **(Common Law Trademark Infringement)**
19 **(Against all Defendants)**

20 72. Kellytoy repeats and re-alleges each and every allegation of paragraphs
21 1 through 52 and 64 through 67 as though fully set forth herein.

22 73. Defendants have violated Kellytoy's exclusive common law rights in
23 the Squishmallow Trade Dress.

24 74. Kellytoy has continuously used its Squishmallow Trade Dress to
25 identify its goods in California and elsewhere, and to distinguish them from goods
26 of a different origin. As such, Kellytoy has common law rights to the Squishmallow
27 Trade Dress.

1 75. Defendants' acts described above constitute trade mark infringement
2 under the common laws of the United States, including California.

3 **FOURTH CAUSE OF ACTION**

4 **(California Common Law Unfair Competition)**

5 (Against all Defendants)

6 76. Kellytoy repeats and re-alleges each and every allegation of paragraphs
7 1 through 52 and 64 through 67 as though fully set forth herein.

8
9 77. This claim arises under the common law of the State of California
10 relating to unfair competition.

11 78. Defendants' Infringing Plush incorporate matter constituting
12 reproductions, copies and colorable imitations of Kellytoy's Squishmallow Trade
13 Dress. Defendants' unauthorized use of Kellytoy's Squishmallow Trade Dress
14 constitutes unfair competition, and is likely to cause confusion and mistake in the
15 minds of the trade and the purchasing public as to the source of the parties' products
16 and to cause purchasers to believe Defendants' products are authentic products of
17 Kellytoy when in fact they are not.

18 79. Upon information and belief, Defendants have intentionally
19 appropriated Kellytoy's Squishmallow Trade Dress with the intent of causing
20 confusion, mistake, and deception as to the source of their goods and with the intent
21 of palming off their goods as those of Kellytoy and to place others in the position to
22 palm off their goods as those of Kellytoy. Defendants have thus committed unfair
23 competition under the common law of the State of California.

24 80. By their actions in infringing Kellytoy's Squishmallow Trade Dress,
25 Defendants are improperly trading upon the reputation and good will of Kellytoy
26 and are impairing Kellytoy's valuable rights in its Squishmallow Trade Dress.

27 81. Upon information and belief, said activities of Defendants alleged
28 herein were and are willful and intentional acts of unfair competition.

83. Upon information and belief, Defendants have engaged in their unlawful conduct alleged herein intentionally, maliciously, fraudulently and oppressively entitling Kellytoy to punitive damages in an amount to be determined at trial.

9 **FIFTH CAUSE OF ACTION**
10 **(California Statutory Unfair Competition –**
11 **California Bus. & Prof. Code § 17200, *et seq.*)**
12 **(Against all Defendants)**

84. Kellytoy repeats and re-alleges each and every allegation of paragraphs 1 through 52, 64 through 68, 73 through 75, and 77 through 80, as though fully set forth herein.

85. By reason of the foregoing, Defendants have been, and are, engaged in
“unlawful, unfair or fraudulent business practices” in violation of California
Business and Professional Code Section 17200 *et seq.*

86. Said activities of Defendants have caused and, if not enjoined, will continue to cause irreparable harm and damage to the rights of Kellytoy in its Squishmallow Trade Dress and to its business reputation and good will. Kellytoy has no adequate remedy at law for these wrongs and injuries. The damage to Kellytoy includes harm to its goodwill and reputation in the marketplace that money cannot compensate. Accordingly, Kellytoy is entitled to a preliminary and permanent injunction restraining and enjoining Defendants' and their agents, servants, and employees, and all persons acting thereunder, in concert with, or on their behalf, from using Kellytoy's Squishmallow Trade Dress, or any colorable imitation or variation thereof, in connection with the sale and/or marketing of any

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1 products. Kellytoy is further entitled to restitutionary disgorgement of all of
2 Defendants' ill-gotten gains pursuant to California Business and Professions Code §
3 17203 and to recover its costs and attorneys' fees incurred in bringing and
4 prosecuting this action.

5 **PRAYER FOR RELIEF**

6 WHEREFORE, Kellytoy prays for judgment against Defendants as follows:

7 1. That Defendants, their officers, members, directors, agents, servants,
8 employees, successors, licensees, representatives, successors, assigns, and all
9 persons acting in concert or participation with them, be permanently enjoined and
10 restrained from:

- 11 (i) Manufacturing, importing, distributing, advertising, offering to
12 sell or selling the Infringing Plush or any colorable imitations of
13 the Squishmallow Designs and/or Squishmallow Trade Dress;
14 (ii) Using the Squishmallow Trade Dress or any confusingly similar
15 trade dress in connection with plush or other toys;
16 (iii) Using the Squishmallow Trade Dress, or any confusingly similar
17 mark, in connection with the advertisement, offer to sell or sale of
18 any toy products;
19 (iv) Using any false designation of origin, or representing or
20 suggesting directly or by implication that Defendants, or any
21 brands or other sources identifiers created by Defendants, or their
22 toys, are affiliated with, associated with, authorized by, or
23 otherwise connected to Kellytoy, or that Defendants are
24 authorized by Kellytoy to use the Squishmallow Trade Dress or
25 Squishmallow Designs;
26 (v) Copying, distributing, displaying or making derivative works of
27 the Squishmallow Designs;
28

1 (vi) Engaging in any other activity constituting unfair competition
2 with Kellytoy, or constituting infringement of the Squishmallow
3 Trade Dress or Squishmallow Designs; and

4 (vii) Assisting, aiding, or abetting any other person or business entity
5 in engaging or performing any of the activities referred to in
6 subparagraphs (i) through (vi) above, or effecting any
7 assignments or transfers, forming new entities or associations, or
8 utilizing any other device for the purpose of circumventing or
9 otherwise avoiding the prohibitions set forth in subparagraphs (i)
10 through (vi) above.

11 2. That Defendants be directed to file with the Court and serve on
12 Kellytoy, within thirty (30) days after entry of a final injunction, a report in writing
13 under oath setting forth in detail the manner and form in which Defendants have
14 complied with the injunction.

15 3. That the Court direct any third parties providing services to
16 Defendants in connection with any infringing and/or enjoined conduct, including
17 social media platforms (*e.g.*, Instagram, Facebook, Twitter), online marketplaces
18 (*e.g.*, Alibaba, eBay, Etsy, AliExpress, Amazon, Taobao), online payment
19 providers, including credit card companies (*e.g.*, PayPal, Visa) and other service
20 providers (*e.g.*, Google, GoDaddy, LiveChat, Shopify) to cease providing services
21 to Defendants in connection with the offer for sale and sale of the Infringing Plush
22 or any other products using or embodying the Squishmallow Trade Dress or
23 Squishmallow Designs.

24 4. That Defendants be required to pay Kellytoy such damages as it has
25 sustained as a consequence of Defendants' infringement of the of the Squishmallow
26 Trade Dress and trebling of those damages under 15 U.S.C. § 1117;

27 5. Adjudge that each of the Defendants, by its unauthorized use of
28 Kellytoy's the Squishmallow Trade Dress for plush toys, and such other acts as it

1 may have undertaken relating to the Squishmallow Trade Dress, have violated
2 Kellytoy's rights under 15 U.S.C. § 1125(a), under California state law (including,
3 without limitation, Cal. Bus. & Prof. Code § 17200 *et seq.*), and under common law,
4 and that they have done so willfully and for the purpose of violating Kellytoy's
5 rights and damaging Kellytoy's goodwill and reputation in the Squishmallow Trade
6 Dress;

7 6. Direct Defendants to provide Kellytoy with an identification in writing
8 of any and all entities that are presently using the Squishmallow Designs and/or
9 Squishmallow Trade Dress in the United States on Defendants' behalf and inform
10 them that they must immediately cease such use;

11 7. Direct Defendants to immediately recall any and all merchandise
12 previously provided to any United States entity under the Squishmallow Trade
13 Dress or Squishmallow Designs;

14 8. Enter an order, pursuant to 15 U.S.C § 1118, directing Defendants to
15 deliver for destruction all products, brochures, marketing materials, decals, stickers,
16 signs, prints, packages, receptacles, wrappers, boxes, and advertisements in their
17 possession or under their control, bearing any unauthorized copy of any of the
18 Squishmallow Trade Dress, or any simulation, reproduction, counterfeit, copy,
19 confusingly similar likeness, or colorable imitation thereof, and all plates, molds,
20 matrices, programs and other means of making same;

21 9. Enter an order, pursuant to 17 U.S.C. § 503(a), impounding all of
22 Defendants' products that infringe Kellytoy's copyrights in the Squishmallow
23 Designs, as well as any plates, molds, matrices, programs, or other articles by means
24 of which copies of the works embodied in the Squishmallow Designs may be
25 produced;

26 10. Enter an order, pursuant to 17 U.S.C § 503(b), requiring the destruction
27 of all copies of Defendants' products that infringe Kellytoy's copyright in the
28 Squishmallow Designs, as well as any plates, molds, matrices, programs, or other

1 articles by means of which copies of the works embodied in the Squishmallow
2 Designs may be produced;

3 11. That each Defendant provide Kellytoy in writing with the following
4 information relating to Defendants' goods marketed, advertised, offered for sale, or
5 sold under the Squishmallow Trade Dress or Squishmallow Designs:

6 (i) the name, address and telephone number of each and every United
7 States entity to whom Defendants have made available or otherwise
8 provided any such products; and

9 (ii) a full accounting as to the precise dollar amount of such products made
10 available or provided and the profits recognized by Defendants in
11 connection with such actions;

12 12. Direct Defendants to pay the costs of corrective advertising;

13 13. Direct Defendants to pay Plaintiffs' attorneys' fees and costs incurred
14 in initiating and prosecuting this action;

15 14. Direct Defendants to pay punitive damages and exemplary damages
16 according to proof;

17 15. That Kellytoy recover its actual damages, Kellytoy's lost profits, and
18 Defendant's profits arising from Defendants' conduct complained-of herein;

19 16. That the Court award enhanced profits and treble damages;

20 17. That Kellytoy be awarded statutory damages;

21 18. That Kellytoy be awarded interest, including pre-judgment
22 interest, on the foregoing sums;

23 19. That the Court direct such other actions as the Court may deem just and
24 proper to prevent the public from deriving the mistaken impression that any
25 products or services offered, advertised, or promoted by or on behalf of Defendants
26 are authorized by Kellytoy or related in any way to Kellytoy's products or services;

27 20. That Defendants be ordered to disgorge all of their ill-gotten gains
28 pursuant to California Business and Professions Code § 17203; and

Respectfully submitted,

FREEMAN, FREEMAN & SMILEY, LLP

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DEMAND FOR JURY TRIAL

Plaintiffs hereby demand and request a trial by jury of all issues raised that are triable by jury.

Respectfully submitted,

DATED: March 5, 2019

FREEMAN, FREEMAN & SMILEY, LLP

By: / s / Mark B. Mizrahi

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

KELLYTOY (USA), INC., a California
 corporation; and KELLYTOY
 WORLDWIDE, INC., a California
 corporation,

Plaintiffs,

vs.

DAN-DEE INTERNATIONAL, LTD., a
 Delaware corporation; RITE AID
 CORPORATION, a Delaware corporation,
 and DOES 1 through 10, inclusive,

Defendants.

Case No. 2:18-cv-05399-JAK (AGR_x)

**DEFENDANTS DAN-DEE
 INTERNATIONAL, LTD.'S AND
 RITE AID CORPORATION'S
 NOTICE OF MOTION AND MOTION
 TO DISMISS SECOND AMENDED
 COMPLAINT; MEMORANDUM OF
 POINTS AND AUTHORITIES**

Date: June 17, 2019
 Time: 8:30
 Ctrm: 10B

Complaint Filed: June 15, 2018
 Trial Date: None Set

DAN06-01:2449390 1:4-2-19

DEFENDANTS DAN-DEE INTERNATIONAL, LTD.'S AND RITE AID CORPORATION'S NOTICE OF MOTION
 AND MOTION TO DISMISS SECOND AMENDED COMPLAINT; MEMORANDUM OF POINTS AND
 AUTHORITIES

TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on June 17, 2019 at 8:30 a.m., or as soon thereafter as the matter may be heard in the above-entitled court, located at 350 W. 1st Street, Los Angeles, California, 90012, Courtroom 10B, Defendants Dan-Dee International, Ltd. and Rite Aid Corporation (together, “Defendants”) will and hereby do move the Court, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure (“FRCP”), to dismiss Counts 2 through 5 of Plaintiffs Kellytoy (USA), Inc. and Kellytoy Worldwide, Inc.’s (together, “Plaintiffs”) Second Amended Complaint for failure to state a claim.

This motion is made on the ground that Plaintiffs have failed to state a claim for federal trade dress infringement, common law trademark infringement, California common law unfair competition, and California statutory unfair competition.

This Motion will be based on this Notice of Motion and Motion, the Memorandum of Points and Authorities filed concurrently herewith, and such further arguments and papers as may be presented to the Court before or during the hearing.

Dated: April 2, 2019

CALL & JENSEN
A Professional Corporation
Scott P. Shaw
L. Lisa Sandoval

By: /s/ L. Lisa Sandoval
L. Lisa Sandoval

Attorneys for Defendants Dan-Dee International,
Ltd. and Rite Aid Corporation

CALL &
JENSEN
EST. 1981

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MEMORANDUM OF POINTS AND AUTHORITIES

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, Defendants Dan-Dee International, Ltd. (“Dan-Dee”) and Rite Aid Corporation (“Rite Aid”) (collectively, “Defendants”) move this Court for an Order dismissing counts two through five of the Second Amended Complaint (“Second Amended Complaint,” Dkt. 46) filed by Plaintiffs Kellytoy (USA), Inc. and Kellytoy Worldwide, Inc. (collectively, “Kellytoy” or “Plaintiffs”), with prejudice.

This motion is made following the conference of counsel pursuant to L.R. 7-3, which took place on Thursday, March 21, 2019.

I. INTRODUCTION

After this Court dismissed Kellytoy’s First Amended Complaint, Kellytoy revised its description of its trade dress for a second time. However, little has changed, and Kellytoy’s description of its trade dress remains “too broad to form the basis of a plausible claim for trade dress infringement.” (Order on Motion to Dismiss, Dkt. 39, at 9).¹ Kellytoy’s revisions make clear that it simply cannot articulate a trade dress that covers its entire line of Squishmallows and at the same time shoehorn Dan-Dee’s products into that description. The Second Amended Complaint is the third time Kellytoy has unsuccessfully tried to describe a trade dress that can act as a source indicator. However, since its products lack uniformity, Kellytoy’s description is so broad it encompasses a wide variety of existing products of others and impermissibly covers an entire product category. Finally, since each and every element of Kellytoy’s purported trade dress is functional (and the arrangement of those elements is dictated by the function of a particular looking stuffed toy), the trade dress is not protectable as a matter of law, and Kellytoy fails to state any actionable claim.

¹ For convenience, paragraph 23 of Kellytoy’s original Complaint (Dkt. 1, ¶ 23), the First Amended Complaint (Dkt. 16, ¶ 23), and the Second Amended Complaint (Dkt. 46, ¶ 23) are attached as an Appendix to this Memorandum.

II. LEGAL STANDARDS

A. Motion to Dismiss

Rule 12(b)(6) of the Federal Rules of Civil Procedure mandates the dismissal of claims for “failure to state a claim upon which relief can be granted.” In *Bell Atlantic Corporation v. Twombly*, the Supreme Court concluded that, to survive a motion to dismiss for failure to state a claim, a complaint must advance “allegations plausibly suggesting (not merely consistent with)” a successful claim for relief. 550 U.S. 544, 557 (2007).

“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). “[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss” *Iqbal*, 556 U.S. at 679. “Nor does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557). Accordingly, Rule 8 “does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.” *Iqbal*, 556 U.S. at 678-79. “[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged -- but it has not ‘show[n]’-- ‘that the pleader is entitled to relief.’” *Id.* at 679 (citing Fed. R. Civ. P. 8(a)(2)).

Under this standard, Plaintiffs must allege facts which, if proven, would plausibly entitle it to the relief it seeks. Plaintiffs’ Second Amended Complaint must contain allegations “respecting all the material elements necessary to sustain recovery under some viable legal theory.” *Sherman-Bey v. Marshall*, No. CV 09-06494 RGK (RZ), 2011 U.S. Dist. LEXIS 73801, at *12 (C.D. Cal. Apr. 25, 2011). As discussed more fully below, since Plaintiffs have not alleged (and cannot allege) the existence of trade dress in the entire Squishmallows product line that is protectable, it is impossible to

1 allege facts that would entitle Plaintiffs to relief under the Lanham Act, common law, or
2 the law of the State of California.

3 **B. Trade Dress**

4 The Lanham Act provides for the protection of trademarks and trade dress used to
5 identify and distinguish a producer's goods from those manufactured or sold by others
6 and to indicate the source of the goods. *See* 15 U.S.C. § 1127. Pertinent to this case,
7 the Lanham Act provides a cause of action for infringement of unregistered trade dress,
8 a category that includes both packaging design and product design. *See* 15 U.S.C. §
9 1125(a). The trade dress of a product refers to its "total image and overall appearance."
10 *Aurora World, Inc. v. TY Inc.*, 719 F. Supp. 2d 1115, 1141 (C.D. Cal. 2009) (citing *Two*
11 *Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 769-70 (1992)).

12 Here, Plaintiffs assert infringement of the Squishmallows trade dress embodied in
13 the design of its **product**, not the packaging, contending that the product design of their
14 varying assortment of products constitutes a source identifier. The Supreme Court has
15 cautioned against misuse or over-extension of trade dress to products, noting that
16 "product design almost invariably serves purposes **other than** source identification . . ."
17 *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 213 (2000) (emphasis
18 added). This is a recognition that the purpose of product design is generally functional
19 and aesthetic and falls outside the scope of trade dress protection.² *See id.* ("Consumers
20 are aware of the reality that, almost invariably, even the most unusual of product
21 designs -- such as a cocktail shaker shaped like a penguin -- is intended not to identify
22 the source, but to render the product itself more useful or more appealing."). Therefore,
23 "[t]rade dress protection must subsist with the recognition that in many instances there
24 is no prohibition against copying goods and products. In general, unless an intellectual
25 property right such as a patent or copyright protects an item, it will be subject to
26 copying." *Traffix Devices v. Mktg. Displays*, 532 U.S. 23, 29 (2001). For this very

27 _____
28 ² Functional or aesthetic features fall under the purview of patent and copyright law.

1 reason, “the Ninth Circuit has advised courts to evaluate such [product design] claims
2 with greater scrutiny than claims involving other forms of trade dress.” *Aurora World*,
3 719 F. Supp. 2d at 1152 (citing *Continental Laboratory Products, Inc. v. Medax*
4 *International, Inc.*, 114 F. Supp. 2d 992, 997 (S.D. Cal. 2000)).

5 The Ninth Circuit has set forth three pleading requirements for a valid claim of
6 trade dress infringement of a product under the Lanham Act. A plaintiff must allege:

7 (1) that its claimed dress is nonfunctional; (2) that its claimed
8 dress serves a source-identifying role[,] either because it is
9 inherently distinctive or has acquired secondary meaning;³
10 and (3) that the defendant’s product . . . creates a likelihood of
consumer confusion.

11 *Clicks Billiards, Inc. v. Sixshooters, Inc.*, 251 F.3d 1252, 1258 (9th Cir. 2001).
12 Moreover, a plaintiff must describe its claimed trade dress with sufficient detail and
13 clarity to give a defendant and the court sufficient notice of the plaintiff’s claim. *See*
14 *Deckers Outdoor Corp. v. Fortune Dynamic, Inc.*, No. CV 15-769 PSG (SSx), 2015
15 U.S. Dist. LEXIS 188274, at *8 (C.D. Cal. May 8, 2015) (“A plaintiff should clearly
16 articulate its claimed trade dress to give a defendant sufficient notice.”); *Homeland*
17 *Housewares, LLC v. Euro-Pro Operating LLC*, No. CV 14-03954 DDP (MANx), 2014
18 U.S. Dist. LEXIS 156675, at *8-9 (C.D. Cal. Nov. 5, 2014); *Mercado Latino, Inc. v.*
19 *Indio Prods.*, No. CV 13-01027 DDP (RNBx), 2017 U.S. Dist. LEXIS 55304, at *4-6
20 (C.D. Cal. Apr. 11, 2017). Here, Plaintiffs’ trade dress claim fails for two reasons -- the
21 claimed trade dress is functional and it continues to be described in far too broad terms
22 to give Defendants or the Court notice of its claim.

23 The burden of proof is on Plaintiffs to prove non-functionality. 15 U.S.C. §
24 1125(a)(3) (“In a civil action for trade dress infringement under this Act for trade dress

25 _____
26 ³ Since Plaintiffs are alleging product design trade dress they must meet the higher burden to prove
27 secondary meaning as product design cannot be inherently distinctive. *See Wal-Mart Stores, Inc. v.*
28 *Samara Bros., Inc.*, 529 U.S. 205, 216 (2000) (“[I]n an action for infringement of unregistered trade
dress under § 43(a) of the Lanham Act, a product’s design is distinctive, and therefore protectable, only
upon a showing of secondary meaning.”).

1 not registered on the principal register, the person who asserts trade dress protection has
2 the burden of proving that the matter sought to be protected is not functional.”); *see also*
3 *Wal-Mart Stores*, 529 U.S. at 210 (Section 43(a) “require[s] that a producer show that
4 the allegedly infringing feature is not ‘functional.’”). There is a “statutory presumption
5 that features are deemed functional until proved otherwise by the party seeking trade
6 dress protection.” *Traffix Devices*, 532 U.S. at 30.

7 Functional elements of a product cannot be granted trade dress protection.
8 According to the Supreme Court, “a product feature is functional, and cannot serve as a
9 [protectable trade dress], if it is *essential to the use or purpose* of the article or it affects
10 the cost or quality of the article. . . . [A] functional feature is one the exclusive use of
11 [which] would put competitors at a significant non-reputation-related disadvantage.”
12 *Traffix Devices*, 532 U.S. at 32 (emphasis added) (internal quotations and citations
13 omitted). Courts also consider whether the feature at issue “constitute[s] the actual
14 benefit that the consumer wishes to purchase, as distinguished from an assurance that a
15 particular entity made, sponsored, or endorsed a product.” *Vuitton et Fils S.A. v. J.*
16 *Young Enterprises, Inc.*, 644 F.2d 769, 774 (9th Cir. 1981). The functionality doctrine
17 prevents trademark and trade dress law, which seek to promote competition by
18 protecting a firm’s reputation, from instead inhibiting legitimate competition by
19 allowing a producer to control a useful product feature.

20 It is the province of patent law, not trademark law, to
21 encourage invention by granting inventors a monopoly over
22 new product designs or functions for a limited time, 35 U.S.C.
23 §§ 154, 173, after which competitors are free to use the
24 innovation. If a product’s functional features could be used as
25 trademarks, however, a monopoly over such features could be
26 obtained without regard to whether they qualify as patents and
27 could be extended *forever* (because trademarks may be
28 renewed in perpetuity).

29 *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 164-165 (1995) (emphasis added).

30 By seeking to use the functional aspects of their products as trademarks, Plaintiffs
31 are diving head first into the very forbidden waters described by the Supreme Court.

III. ARGUMENT

A. Kellytoy Fails to Adequately Identify Protectable Trade Dress

In its Second Amended Complaint, Kellytoy still fails to provide Dan-Dee and the Court with a detailed and precise description of its trade dress. Instead, Kellytoy has simply added more words to its trade dress description resulting in a more confusing definition. Kellytoy's alleged trade dress remains impermissibly vague and broad, and Kellytoy has not met its burden. *See Deckers Outdoor Corp. v. Fortune Dynamic, Inc.*, No. CV 15-769 PSG (SSx), 2015 U.S. Dist. LEXIS 188274, at *8 (C.D. Cal. May 8, 2015) ("A plaintiff should clearly articulate its claimed trade dress to give a defendant sufficient notice."). Paragraph 23 of the Second Amended Complaint defines Kellytoy's alleged trade dress as follows:

- (1) substantially egg/bell-shaped shaped plush toys depicting various similarly shaped fanciful renditions of animals/characters;
- (2) simplified Asian style Kawaii faces with repeating and complementary rounded/oval shaped graphics depicting features on the characters themselves (such as eyes, snouts and bellies) and which conform to and support the overall egg/bell shaped toys;
- (3) embroidered two-dimensional facial features, such as eyes nostrils, mouths;
- (4) distinctive contrasting and non-monochrome coloring; and
- (5) short-pile velvety velour-like textured exterior with a light and silky memory foam-like stuffing providing an extremely soft and squeezable marshmallow feel.

(Dkt. 46, at ¶ 23).

Dan-Dee is at a loss to know what constitutes a "simplified Asian style Kawaii face." Does it mean a "cute" face based on the Japanese-English translation of "Kawaii?" Moreover, what would constitute a "complementary" shaped graphic for eyes, snouts, and bellies?" What about the contrasting coloring is "distinctive?" How

do the “simplified Asian style Kawaii faces” “conform to and support the overall egg/bell shaped toys?”

After attempting to describe its trade dress in words, Kellytoy, in paragraph 23 of the Second Amended Complaint, references the depictions in Exhibit 1. As it argued previously in opposition to the Motion to Dismiss the First Amended Complaint, Kellytoy asserts again that the written descriptions must be read in light of the attached images.

However, the revisions to the Second Amended Complaint are telling. In both the First Amended Complaint and the Second Amended Complaint, Kellytoy included an Exhibit 1, which purportedly showed the individual products that comprise the Squishmallows line. Notably, in Exhibit 1 to the Second Amended Complaint, Kellytoy has quietly removed the following images from the list:⁴



However, as shown in Exhibit 3 to the Second Amended Complaint, these items remain in Kellytoy’s Squishmallow line as do other products not previously listed in Exhibit 1. See Dkt. 46, Ex. 3. For instance, the Squishmallows line also includes the following, which are also missing from Exhibit 1:



⁴ The panda and frog were specifically referred to in Defendants’ Reply Memorandum (Dkt. 34, at 2-3) as examples of toys having very different features than many of the other products.

1 Thus, Dan-Dee is left to wonder were these products left out because Kellytoy
2 has admitted that they do not incorporate the alleged trade dress? Or because the so-
3 called fox, elephant, bunny, and lamb ears are not round? Or because the fox, lamb,
4 chick, and elephant's noses are not round? Or perhaps because the cow, frog, fox,
5 lamb, and elephant do not have "Asian style Kawaii faces"? Or is it because the lamb's
6 coloring is monochrome without "distinctive contrasting coloring"? It is clear that
7 Kellytoy cannot describe its alleged trade dress in precise terms because the entire
8 Squishmallows line does not have a consistent appearance and thus, the enumerated
9 elements (even when combined with the photographs) still "do not provide the level of
10 clarity about the nature and scope of the claimed trade dress as is required by the
11 caselaw." (Dkt. 39, at 9.)

12 Again, Kellytoy does not explain which Squishmallows features are source
13 identifying. As this Court noted, there are "substantial differences among the designs of
14 the products in the Squishmallows line." (Dkt. 39, at 9). In fact, due to the lack of
15 consistency in the Squishmallows line, Plaintiff simply cannot articulate a trade dress
16 that covers the entire line. This is fatal to Kellytoy's claim of trade dress rights. *See*
17 *R.F.M.A.S., Inc. v. So*, 619 F. Supp. 2d 39, 77 (S.D.N.Y. 2009) ("The elements
18 specified as the trade dress must be present in every item in that product line."). In the
19 Second Amended Complaint, Kellytoy has cherry picked certain products from its line
20 that it believes conform to its described trade dress and left out the others. However,
21 Plaintiff cannot pick and choose. Either Plaintiff has a trade dress that covers the entire
22 line of Squishmallows or it does not. Defendants assert it does not.

23 In the Second Amended Complaint, Kellytoy has introduced a new term "Asian
24 style Kawaii face" in place of the similarly vague term "anime-inspired." The use of
25 impermissibly broad and vague terms continues to describe an entire genre of products
26 that have flooded the toy market both before and after Plaintiffs' introduction of its
27 Squishmallow line. Kellytoy is attempting to use that broad definition to belatedly seek
28

1 to keep Dan-Dee out of that broad market. This is improper. *See Deckers Outdoor*
2 *Corp. v. Fortune Dynamic, Inc.*, No. CV 15-769 PSG (SSx), 2015 U.S. Dist. LEXIS
3 188274, at *8 (C.D. Cal. May 8, 2015) (“A plaintiff should clearly articulate its claimed
4 trade dress to give a defendant sufficient notice.”); *Diamond Foods, Inc. v. Hottrix,*
5 *LLC*, No. 14-cv-03162-BLF, 2016 U.S. Dist. LEXIS 93247, at *30 (N.D. Cal. July 18,
6 2016) (Plaintiff must “plead the ‘precise expression of the character and scope of the
7 claimed trade dress.’”).

8 For the reasons discussed above, Plaintiffs’ claims of trade dress rights still do
9 not provide sufficient notice of what constitutes the alleged trade dress and do not state
10 a valid claim for relief because Plaintiffs’ claims are so broad and vague that they cover
11 an entire product category and a general idea. Defendants are at a loss to know what
12 Plaintiffs are claiming to own and the trade dress claims asserted in the Second
13 Amended Complaint should be dismissed on this ground alone.

14 **B. Kellytoy’s Alleged Trade Dress is Functional**

15 The elements of the alleged “Squishmallow Trade Dress” are set forth in
16 paragraph 23 of the Second Amended Complaint. *See* Appendix attached hereto. Aside
17 from adding the gratuitous, conclusory, and patently false statement in paragraph 64 of
18 the Amended Complaint that the “Squishmallow Trade Dress is non-functional,”
19 Plaintiffs continue to provide no support for such contention. On this basis alone,
20 Plaintiffs fail to adequately plead a claim for trade dress infringement. *See Deckers*
21 *Outdoor Corp.*, 2015 U.S. Dist. LEXIS 188274, at *12-13 (“In light of the standard
22 pleading requirement that plaintiffs support the elements of their claims with more than
23 conclusory statements, the Court is persuaded by the approach of district courts that
24 require plaintiffs to allege how a trade dress is non-functional. . . . The Court holds that
25 Plaintiff’s conclusory statement of non-functionality fails to sufficiently allege the
26 element, particularly because some features of the claimed trade dress do perform a
27 utilitarian function . . .”).

1 The trade dress elements articulated by Plaintiffs are set forth above.
2 “[D]etermining whether a complaint states a plausible claim for relief will . . . be a
3 context-specific task that requires the reviewing court to draw on its judicial experience
4 and common sense.” *Iqbal*, 556 U.S. at 679. Here, each of the elements of alleged
5 trade dress asserted by Kellytoy is functional, “constitutes the actual benefit that the
6 consumer wishes to purchase,” and thus, is not entitled to trade dress protection.

7 1. **“substantially egg/bell-shaped shaped plush toys depicting**
8 **various similarly shaped fanciful renditions of**
9 **animals/characters”**

10 Here, Plaintiffs have added the term “egg” to its prior description of the shape of
11 its Squishmallow trade dress. Referring to Exhibit 1 of the Second Amended
12 Complaint for examples of what is meant by “egg/bell shaped,”⁵ to the extent the shapes
13 are consistent, “substantially egg/bell-shaped” is believed to mean substantially oval in
14 shape with a flattened bottom. The flattened bottom is essential to allowing the product,
15 a plush toy, to stand upright and is undeniably functional.⁶ Moreover, most stuffed toys
16 depict animals or characters.

17 2. **“simplified Asian style Kawaii faces with repeating and**
18 **complementary rounded/oval shaped graphics depicting features**
19 **on the characters themselves (such as eyes, snouts and bellies)**
20 **and which conform to and support the overall egg/bell shaped**
21 **toys”**

22 The claimed “simplified Asian style Kawaii faces,” while aesthetic, are
23 functional since the right to use them exclusively “would put competitors at a
24 significant non-reputation-related disadvantage” and exclusive rights would preclude
25 others from competing for a broad range of stuffed toys. *Traffix Devices*, 523 U.S. at 32
(quoting *Qualitex*, 514 U.S. at 165). In fact, this Court has made clear that “the

26 ⁵ The dictionary definition of “bell-shaped” is something having the shape of a bell such as the flared
27 end of a wind instrument (see <https://www.merriam-webster.com/dictionary/bell>) which does not
28 apply to the shape of the products shown in Plaintiffs’ Exhibit 1.

⁶ A stuffed toy having a bell-shaped or an oval body portion can hardly be viewed as distinctive.

1 aesthetic features of plush toys . . . are essential selling features of the toys” and
2 therefore, functional. *See Aurora World*, 719 F. Supp. 2d at 1149. Moreover, as in
3 *Aurora World*, facial features “are essential to the goal of making the plush toys look
4 like animals.” *Id.* at 1147. To the extent the facial features “support the overall
5 egg/bell shaped toys,” is further evidence of functionality.

6 **3. “embroidered two-dimensional facial features, such as eyes**
7 **nostrils, mouths”**

8 Here again, facial features such as eyes, nostrils, and mouths “are essential to the
9 goal of making the plush toys look like animals.” *Id.* at 1147. That they are
10 embroidered is insignificant as it is a common and safe way to affix features on stuffed
11 animals.

12 **4. “distinctive contrasting and non-monochrome coloring”**

13
14 This is a newly added element of the purported trade dress, first appearing in the
15 Second Amended Complaint. A “non-monochrome” and “distinctive” color scheme are
16 aesthetic features which “are essential selling features” of plush toys and therefore,
17 functional. *See Aurora World*, 719 F. Supp. 2d at 1149. The exclusive right to
18 manufacture plush toys in “non-monochrome coloring” would certainly “put
19 competitors at a significant non-reputation-related disadvantage.” *Traffix Devices*, 523
20 U.S. at 32 (quoting *Qualitex*, 514 U.S. at 165).

21 **5. “short-pile velvety velour-like textured exterior with a light and**
22 **silky memory foam-like stuffing providing an extremely soft and**
23 **squeezable marshmallow feel”**

24 The velvety velour-like textured exterior is an essential property of any “plush”
25 toy. Plaintiffs’ addition that it is “short-pile” does nothing to change this. The exterior
26 must be soft and plush for a toy to fall into the category of a stuffed animal or plush toy
27 and this is what the consumer is seeking to buy. Where a feature “constitutes the actual
28

benefit that the consumer wishes to purchase” it is functional. *Vuitton et Fils S.A. v. J. Young Enterprises, Inc.*, 644 F.2d 769, 774 (9th Cir. 1981).

The “light and silky” memory foam-like stuffing is likewise an essential property of any “stuffed” toy.⁷ Again, this is what consumers are seeking to buy -- a stuffed toy - - and that is how such toys are made and how they look. A “velvety” exterior with stuffing cannot possibly constitute trade dress for a stuffed or plush toy regardless of how many adjectives are used to describe it. Moreover, trade dress protection extends to the overall image or look of a product design, not the tactile properties that cannot be seen by the consumer. *See Aurora World*, 719 F. Supp. 2d at 1141 (citing *Global Manufacturing Group, LLC v. Gadget Universe.Com*, 417 F. Supp. 2d 1161, 1166 (S.D. Cal. 2006)).

Here, once again, Plaintiffs have “merely listed attributes of its products that are common to many plush toys and asserted they are not utilitarian.” *Aurora World*, 719 F. Supp. 2d at 1150. This is not enough to survive a motion to dismiss. *Id.* All plush toys that fall into the category of anime-inspired, Kawaii or “cute” faced plush toys are stuffed, have soft velvety exteriors, and substantially flat bottoms so that they do not topple over. Some are egg shaped; others are bell shaped. The right to use these features exclusively, as belatedly sought by Plaintiffs, “would put competitors at a significant non-reputation-related disadvantage.” *Traffix Devices*, 532 U.S. at 32. This is fatal to Plaintiffs’ trade dress claim of which “the whole is nothing other than the assemblage of functional parts.” *Secalt S.A. v. Wuxi Shenxi Constr. Mach. Co.*, 668 F.3d 677, 684 (9th Cir. 2012) (citing *Leatherman Tool Grp. v. Cooper Indus.*, 199 F.3d 1009, 1013 (9th Cir. 1999)). In sum, Plaintiffs’ entire product design is functional and thus, cannot be recognized as a trademark. *See Aurora World*, 719 F. Supp. 2d at 1146 (“For an overall product configuration to be recognized as a trademark, the entire design

⁷ In fact, like most toys, Plaintiffs’ stuffed toys are stuffed with ordinary polyester fill rather than “marshmallow” or memory foam. The stuffing is conventional.

79. Upon information and belief, Defendants have intentionally appropriated Kellytoy's ***Squishmallow Trade Dress*** with the intent of causing confusion, mistake, and deception as to the source of their goods and with the intent of palming off their goods as those of Kellytoy and to place others in the position to palm off their goods as those of Kellytoy. Defendants have thus committed unfair competition under the common law of the State of California.

(Dkt. 46, ¶¶ 78-79) (emphasis added). In their fifth cause of action for California statutory unfair competition under California Business and Professions Code § 17200 Plaintiffs allege:

86. Said activities of Defendants have caused, if not enjoined, and will continue to cause irreparable harm and damage to the rights of Kellytoy in its ***Squishmallow Trade Dress*** and to its business reputation and good will. Kellytoy has no adequate remedy at law for these wrongs and injuries. The damage to Kellytoy includes harm to its goodwill and reputation in the marketplace that money cannot compensate. Accordingly, Kellytoy is entitled to a preliminary and permanent injunction restraining and enjoining Defendants' and their agents, servants, and employees, and all persons acting thereunder, in concert with, or on their behalf, from using Kellytoy's ***Squishmallow Trade Dress***, or any colorable imitation or variation thereof, in connection with the sale and/or marketing of any products. Kellytoy is further entitled to restitutional disgorgement of all of Defendants' ill-gotten gains pursuant to California Business and Professional Code § 17203 and to recover its costs and attorneys' fees incurred in bringing and prosecuting this action.

(Dkt. 46, ¶ 86) (emphasis added).

While the specific language differs from claim to claim, each is based upon Defendants' unauthorized use of Plaintiffs' alleged exclusive rights in the claimed Squishmallow Trade Dress. Since the Squishmallow Trade Dress is not protectable, and since each of these claims is based on the copying of a protectable trade dress, Plaintiffs' third, fourth, and fifth causes of action fail to state a claim and should be dismissed. The Ninth Circuit "has consistently held that state common law claims of unfair competition and actions pursuant to California Business and Professions Code

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§ 17200 are ‘substantially congruent’ to claims made under the Lanham Act.” *Deckers Outdoor Corp.*, 2015 U.S. Dist. LEXIS 188274, at *22 (citing *Cleary v. News Corp.*, 30 F.3d 1255, 1262-63 (9th Cir. 1994)); *see also* this Court’s Order on Motion to Dismiss, Dkt. 39, at 10. Thus, because Plaintiffs have “failed to plead trade dress infringement, [their claims] premised on the same theory are likewise insufficiently pled” *Id.* at 23.

IV. CONCLUSION

None of Plaintiffs’ causes of action two through five state a claim upon which relief can be granted. Further, in light of Kellytoy’s continued inability to describe its purported trade dress in terms having sufficient clarity about the nature and scope of its claimed trade dress, Defendants respectfully request that the second, third, fourth and fifth causes of action in the Second Amended Complaint be dismissed with prejudice.

Dated: April 2, 2019

CALL & JENSEN
A Professional Corporation
Scott P. Shaw
L. Lisa Sandoval

By: /s/ L. Lisa Sandoval
L. Lisa Sandoval

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APPENDIX

23. Kellytoy sells a broad range of Squishmallows that feature the brand's iconic trade dress, which is not easily reduced to writing, but includes, without limitation: (1) substantially bell-shaped plush toy animals/characters (i.e. substantially oval in shape with substantially flat bottoms), (2) Japanese-inspired minimalist and whimsical facial features, (3) a velvety velour-like-plush exterior, and (4) stuffed with a "spongy," memory foam-like stuffing -- as more fully depicted in **Exhibit 1** hereto -- features common to Kellytoy's line of Squishmallows (collectively the "Squishmallow Trade dress") which are the subjects of numerous United States copyright registrations. The plush designs depicted in **Exhibit 2** -- a subset of Kellytoy's line of Squishmallows -- comprise some of Kellytoy's most popular Squishmallows, which were created by or assigned to Kellytoy (the "Squishmallow Designs"). As set forth in greater detail below, these Squishmallow Designs are the subject of Copyright Registrations issued by the United States Copyright Office, pursuant to 17 U.S.C. 91 *et seq.*

(Compl., Dkt. 1 ¶ 23).

23. Kellytoy sells a broad range of Squishmallows that feature the brand's iconic trade dress, which is not easily reduced to writing, but includes, without limitation: (1) substantially bell-shaped plush toys embodying fanciful renditions of animals/characters, (2) embroidered anime-inspired minimalist, whimsical facial features, (3) a velvety velour-like textured exterior, and (4) stuffing with a light "marshmallow," memory foam-like texture -- as more fully depicted in **Exhibit 1** hereto -- features common to Kellytoy's line of Squishmallows (collectively together with **Exhibit 1** the "Squishmallow Trade Dress").

(FAC, Dkt. 16 ¶ 23).

23. Kellytoy sells a broad range of SQUISHMALLOW branded plush toys featuring the brand's iconic trade dress, and whose overall look, feel and image -- and in particular but without limitation in shapes, colors, textures and graphics -- serve as a distinctive source identifier to the consuming public. Though not easily reduced to writing, these features include: (1) substantially egg/bell shaped plush toys depicting various similarly shaped fanciful renditions of animals/characters; (2) simplified Asian style Kawaii faces with repeating and complementary rounded/oval shaped

1 graphics depicting features on the characters themselves (such
2 as eyes, snouts and bellies) and which conform to and support
3 the overall egg/bell shape of the toys; (3) embroidered two-
4 dimensional facial features, such as eyes, nostrils, mouths; (4)
5 distinctive contrasting and non-monochrome coloring; and (5)
6 short-pile velvety velour-like textured exterior with a light
7 and silky memory foam-like stuffing providing an extremely
8 soft and squeezable marshmallow feel. These features, and
9 the resulting overall look and feel of these toys, are more fully
10 depicted, without limitation, in **Exhibit 1** hereto -- features
11 common to Kellytoy's line of Squishmallows (collectively
12 together with **Exhibit 1** the "Squishmallow Trade Dress").

13 (Second Amended Complaint, Dkt. 46 ¶ 23).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. 2:18-cv-05399-JAK-AGR Date 9/23/2019
Title KELLYTOY USA, INC. ET AL V. DAN-DEE INTERNATIONAL, LTD. ET AL

Present The Honorable JOHN A. KRONSTADT, UNITED STATES DISTRICT JUDGE

Andrea Keifer

Deputy Clerk

Not Reported

Court Reporter / Recorder

Attorneys Present for Plaintiffs:

Not Present

Attorneys Present for Defendants:

Not Present

Proceedings: (IN CHAMBERS) ORDER DISMISSING CASE WITHOUT PREJUDICE (JS-6)

In light of the parties' Notice of Settlement, the Court orders that this action is dismissed without prejudice. The Court retains jurisdiction to vacate this Order and to reopen the action within 45 days from the date of this Order, provided, however, any request by any party(ies) that the Court do so, shall make a showing of good cause as to why the settlement has not been completed within the 45-day period, what further settlement processes are necessary, and when the party(ies) making such a request reasonably expect the process to be concluded. This Order does not preclude the filing of a stipulation of dismissal with prejudice pursuant to Fed. R. Civ. P. 41, which does not require the approval of the Court. Such stipulation shall be filed within the aforementioned 45-day period, or by such later date ordered by the Court pursuant to a stipulation by the parties that conforms the requirements of a showing of good cause stated above.

Initials of Preparer: ake:00

EXHIBIT J

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

KELLYTOY WORLDWIDE, INC. and)	Case No. 1:20-cv-00748
KELLYTOY (USA), INC.,)	
)	Honorable Gary Feinerman
Plaintiffs,)	
)	
vs.)	
)	
TY INC., and DOES 1-10,)	
)	
Defendants.)	
)	

**PLAINTIFF KELLY TOY WORLDWIDE, INC.’S MEMORANDUM OF LAW IN
SUPPORT OF ITS MOTION FOR PRELIMINARY INJUNCTION**

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I. INTRODUCTION

Imitation may indeed be by the height of flattery, but in nakedly imitating the distinctive look and feel of Kellytoy Worldwide, Inc.’s (“Kellytoy”) Squishmallow’s plush toys, Ty, Inc. (“Ty”) has accelerated past the line of permissible competition and into an obvious infringement of the Squishmallows trade dress. And given the transparent nature of the infringement and the clear resulting risk to Squishmallows’ hard earned goodwill, only a preliminary injunction can prevent Kellytoy from suffering irreparable harm.

The facts and law demanding this result are straightforward. Kellytoy introduced the Squishmallows line – a series of plush toys with abstract depictions of popular animals – in 2017, and did so after a lengthy design process focused on creating a line of toys that maintained a unique combination of features heretofore not seen in the U.S. marketplace. It succeeded. In fact, Kellytoy’s designers and an independent industry expert confirm below that assembly of non-functional characteristics – namely, an egg/bell shape without discrete limbs and no torso, embroidered facial features based on the Japanese Kawaii style, and a soft shell with a squishy stuffing – are not found on other plush toys in the United States. Nor is there any doubt that the overwhelming consumer and industry reaction to Squishmallows give rise to clear secondary meaning under applicable law, affording Squishmallows durable trade dress rights. The assembly of evidence set out below, including extensive advertising and marketing, 40 million units shipped to national retailers in three years, widespread consumer engagement on social media and otherwise, all put that question firmly to rest.

Ty, against that backdrop, now seeks to misappropriate that goodwill by selling competing goods that unambiguously copy the particular look and feel of Squishmallows. That Ty is deliberately converting the unique combination of elements defining the Squishmallows trade dress cannot be the subject of any reasonable dispute. A simple review of two of the parties’ respective products confirms the intentional nature of this infringement:

Kellytoy Squishmallow



Ty's Squish-a-Boo



Beyond that, the concurrently filed declaration of an established industry expert – Richard Gottlieb – echoes that inevitable conclusion, making this a garden variety infringement case: Squishmallows embody protectable trade dress that Ty is knowingly infringing.

That much resolves the likelihood that Kellytoy will ultimately prevail on the merits of its claims – it will. But it will also suffer clear irreparable harm if Ty is not enjoined as requested. Specifically, Ty intends to market its infringing toys nationwide – and has already exhibited them at toy industry trade shows – and the imminent threat of that full throated infringement campaign cannot be overstated. Ty should not be permitted to trade off of the Squishmallows goodwill and in the process confuse the public into believing that Ty's Infringing Plush¹ originates from or is associated with Kellytoy's originals. Kellytoy has the exclusive right – indeed, the duty – to control its reputation, but it cannot control the quality of infringing goods, be they Ty's or another competitor's. And the more the public is exposed to Ty's competing products, ones incorporating the features of the Squishmallows Trade Dress (shape, etc.), the less resonant and valuable will be the trade dress in functioning as indicia of product source. Left with no other option in protecting its rights, Kellytoy now moves this court for a preliminary injunction to prevent Ty from distributing the Infringing Plush until this case is resolved.

II. STATEMENT OF FACTS

Kellytoy creates, manufactures, distributes, and sells unique plush toys. (Declaration of Jeanne Yoon ("Decl. Yoon") ¶ 8.) This includes the highly successful and famous Squishmallows line of plush animals, which Kellytoy created Squishmallows in 2016. (*Id.* ¶ 9.)

¹ See Exhibit I to the Mizrahi Declaration attaching photographs of the Infringing Plush.

That creation introduced a new class of plush toys and carved a previously non-existent niche in the marketplace, and the public has enthusiastically embraced Squishmallows – Kellytoy has shipped approximately 40 million units of Squishmallows since the summer of 2017, resulting in tens of millions of dollars in revenue to Kellytoy. (*Id.* ¶ 23.)

The scope of this success is the product of deliberate design decisions intended to distinguish Squishmallows from other plush toys. Jeanne Yoon – Kellytoy’s Vice-President of Sales and Development – explains in her declaration, for example, that Kellytoy’s designers settled on the particular elements of the Squishmallows design to create an identifiable look and feel that would distinguish Kellytoy’s goods from others in the marketplace. (*Id.* ¶ 10.) Those elements include: (1) a specific egg/bell shape (including the lack of a discrete head and torso) lacking proportionate, pronounced limbs; (2) abstract, embroidered facial features based on the Japanese Kawaii style; (4) oval/rounded graphic features; and (5) an ultra-soft shell and mooshy, silky stuffing, as more fully described at Paragraph 31 of the Complaint (the “Squishmallows Trade Dress”). (*Id.*) And Ms. Yoon attaches, as Exhibit 1 to her declaration, examples of Squishmallows reflecting the unmistakable trade dress they embody. (*Id.*, Ex. 1.) Beyond that, the commercial peculiarity of that combination of features, and the fact that Squishmallows are the only plush toy line embodying them, is confirmed by Richard Gottlieb – an experienced toy industry expert – whose accompanying declaration makes clear that these toys “possess a distinctive overall look and feel that is not shared by the plush toys of others in the marketplace.” (Gottlieb Decl. ¶ 16.) Mr. Gottlieb’s expert conclusion is based on his review of thousands of plush toys – constituting a representative sample of the marketplace – as a means of testing the distinctive nature of Squishmallows. (*Id.* ¶ 13.)

That singularity of combined features has facilitated the undeniable popularity of Squishmallows, and the resonance of their design with the consuming public and the industry at large. These goods are sold nationwide and in the country’s largest retailers, including Costco, Walmart, Walgreens, CVA, Kroger, Fred Meyer, Target, Party City, Dave & Busters and Knotts Berry Farm. (*Id.* ¶ 22.) Squishmallows have also been featured in various national media – Ok! Magazine, E! News, the Chicago Tribune, the Washington Post, the Pittsburgh Post-Gazette and

the Houston Chronicle, a mere sampling of the media attention generated – and have received numerous industry awards, *e.g.*, by the National Parenting Product Awards, Toys Tots Pets & More, Parents’ Choice, HowToLearn.com, Creative Child, The Mom’s Choice Awards, and The National Parenting Center. (*Id.* ¶¶ 10, 22 and 23.) Given this consumer buzz, industry insiders have not surprisingly recognized Squishmallows in myriad ways, *e.g.*, Toy Insider named Squishmallows as one of the top holiday toys, Toy Book Magazine featured them in a cover story, and Teddy Bear and Friends Magazine and Animal Tales Magazine likewise featured them and their market success. (Declaration of Elisa Vazquez (“Decl. Vazquez”) ¶¶ 32-33.)

Perhaps the most compelling evidence of Squishmallows’ trade dress, however, is the demonstrable public appetite for information concerning and access to these goods. Dan Grody, a longtime public relations executive Kellytoy retained to coordinate the marketing of Squishmallows, explains more particularly that – in decades of managing PR campaigns – he has never seen the level of consumer engagement Squishmallows has realized since 2017. (Grody Decl. ¶ 9.) Mr. Grody recounts, for example, that a review of Google Trends – tracking search terms and topics – over the past twelve months reveals the significant global force Squishmallows has become, one that in the fall of 2019 surpassed the highly successful Ty’s Beannie Boos and Aurora’s YouHoo & Friends in search volume. (*Id.* ¶ 13.) And that engagement is particularly telling given the limited time Squishmallows have been in the market. Mr. Grody again provides important context in this regard, noting that the metrics he relies upon show that Squishmallows are continuing to expand in popularity at a time (three years post launch) when most brands experience declines, and that the return on marketing investment Kellytoy is enjoying exceeds that of other lines that have devoted far more in resources and time. (*Id.* ¶ 14.) Kellytoy is, in other words, spending less and receiving more on Squishmallow than other toy manufacturers have achieved concerning other brands, a fact Mr. Grody assigns to the distinctive characteristics and look and feel of the goods themselves. (*Id.*)

Mr. Grody’s conclusions are echoed by the evidence of direct consumer engagement of their fans on social media specifically. Those legions of fans share Kellytoy’s social media posts with their followers on Facebook, Instagram, Pinterest, YouTube, and other sites, resulting in

millions of “likes.” (Decl. Vazquez ¶ 15.) A simple Google search for the term *Squishmallows*, for example, returns more than a million results, and countless user-created videos appear on YouTube of fans using and collecting Squishmallows plush toys. (Decl. Yoon ¶ 16; Decl. Vazquez ¶ 27). These fans even put the Squishmallows to transformative uses, such tutorials on how to draw Squishmallows or stop-motion videos. (Decl. Vazquez ¶ 27.) Nor is there any doubt that these consumers identify Squishmallows’ look and feel as source identifiers. Mr. Grody’s Declaration includes, for example, a sampling of recent social media posts from consumers explaining generally their effort to locate Squishmallows, and their disappointment in discovering that some of what they discover are knock-offs. (Decl. Grody ¶ 16.) Those posts are revealing in multiple respects, but most tellingly they reflect the consumers’ understanding that there are “official” Squishmallows and, by corollary, imitation goods whose origins they do not recognize. And that recognition, in turn, establishes that the combination of features Kellytoy designed is operating precisely as intended – to identify the source of origin of Squishmallows.

That consumer recognition, like the product design, did not occur by accident. To the contrary, Kellytoy has spent handsomely advertising and promoting Squishmallows since their 2017 launch, and indeed maintains an annual marketing budget of \$1,000,000 devoted specifically to these goods. (Yoon Decl., ¶ 14.) This includes advertisements to consumers and business-to-business advertisements and, as mentioned above, a robust social media presence dedicated to Squishmallows – these goods have more than 109,000 Instagram followers, 82,000 Facebook followers, and 12,000 Twitter followers, more than many longer-existing and well-known plush brands. (Decl. Vazquez ¶ 14.) Through public relations activities alone, not including paid advertising, Kellytoy’s Squishmallows branded plush toys have garnered over 200 MILLION media impressions and close to another 100 MILLION impressions through paid placements on Facebook and Instagram. (Decl. Grody ¶ 12.)

All of which is to reiterate what is apparent from the record – Kellytoy could have chosen alternate designs for Squishmallows, but instead chose the elements of the Squishmallows Trade Dress to create an easily-identifiable line of toys to distinguish it from the goods of others. Those decisions were not motivated by cost – Kellytoy could have chosen alternative designs

that are less expensive to produce and, in fact, it produces numerous plush toys that cost less to produce than Squishmallows. (Decl. Yoon ¶ 11.) And that fact is important, because Ty, or other Kellytoy competitors, could create plush toys with alternate designs without any disadvantage – other than the disadvantage of not riding on the Squishmallows good will. (*Id.*) For the reasons explained below, however Ty’s intentional decision to misappropriate that good will presents a case where the very essence of trade dress protection is implicated, and where nothing less than injunctive relief will assure that justice is done.

III. ANALYSIS

A. The Preliminary Injunction Standards

To obtain a preliminary injunction, a plaintiff must show: (1) the plaintiff has a reasonable likelihood of success on the merits; and (2) the plaintiff will suffer irreparable harm absent a preliminary injunction and has no adequate remedy at law. *Stuller, Inc. v. Steak N Shake Enterprises, Inc.*, 695 F.3d 676, 678 (7th Cir. 2012); *Turnell v. CentiMark Corp.*, 796 F.3d 656, 661–62 (7th Cir. 2015). If the plaintiff makes this showing, the court considers (3) the irreparable harm the defendant will suffer if preliminary relief is granted balanced against the irreparable harm the plaintiff will suffer if relief is denied; and (4) the public interest in granting or denying the preliminary injunction. *Id.*

B. Kellytoy Is Likely To Succeed On The Merits

A plaintiff satisfies the first requirement if it shows that it has “some likelihood” of success on the merits. *Ty, Inc. v. Jones Grp., Inc.*, 237 F.3d 891, 896 (7th Cir. 2001) (“Initially, the court only needs to determine that the plaintiff has some likelihood of success on the merits.”) This requires only a “better than negligible” chance of succeeding on the merits. *Id.* (quoting *International Kennel Club of Chicago, Inc. v. Mighty Star, Inc.*, 846 F.2d 1079, 1084 (7th Cir.1988)). To succeed on the merits of a trademark action, a plaintiff must prove (1) that it has a protectable trademark, and (2) a likelihood of confusion as to the origin of the defendant’s product. *Id.* at 897; *see also* 11 U.S.C. § 1125(a).² Trade dress encompasses the overall “look

² Kellytoy’s trademark infringement and unfair competition claims alleged in the complaint, under Illinois (Continued...)

and feel” of a product, including its size, color or color combinations, texture, graphics, packaging or other visual features that connote the source of such goods in the minds of consumers – essentially serving the function of a trademark. *See e.g., Roulo v. Russ Berrie & Co.*, 886 F.2d 931, 936 (7th Cir. 1989); *see also Badger Meter, Inc. v. Grinnell Corp.*, 13 F.3d 1145, 1151 (7th Cir. 1994). That is, in certain circumstances, trade dress may extend to features (e.g., shape, texture etc.) of the product itself. *Wal-Mart Stores, Inc. v. Samara Bros.*, 529 U.S. 205, 216 (2000). A plaintiff has a protectable trademark in a product’s design if it has acquired a secondary meaning and is non-functional. *Id.* at 211; *Bodum USA, Inc. v. A Top New Casting Inc.*, 927 F.3d 486, 491 (7th Cir. 2019). As explained below, Kellytoy meets this test and is more than likely to prevail on the merits.

1. **The Squishmallows Trade Dress has developed a secondary meaning**

The Seventh Circuit employs a several-factor factual analysis to determine whether a particular product design has acquired secondary meaning, including: (a) the amount and manner of advertising; (b) the volume of sales; (3) the length and manner of use; (4) consumer surveys; (5) evidence of intentional copying; and (6) unsolicited media coverage. *See Thomas & Betts Corp., v. Panduit Corp.*, 138 F.3d 277, 293 (7th Cir. 1998). The ultimate import of these factors is to determinate when “in the minds of the public, the primary significance of a product feature . . . is to identify the source of the product rather than the product itself.” *Id.* at 291. The *Thomas & Betts* Court observed, for example, that a mark holder may establish secondary meaning by means of “direct consumer testimony, consumer surveys, length and manner of use, amount and manner of advertising, volume of sales, place in the market and proof of intentional copying.” *Id.* at 291.³ Nor does the law make any distinction between the weight to be given to either direct or circumstantial evidence and, indeed, circumstantial evidence may often be “more

statutory and common law, are subject to the same analysis as its Lanham Act claim for purposes of determining likelihood of success on the merits. *Trans Union LLC v. Credit Research, Inc.*, 142 F. Supp. 2d 1029, 1038 (N.D. Ill. 2001) (granting preliminary injunction).

³ We note that the Seventh Circuit has long held that survey evidence is not required to prove secondary meaning. *See e.g., Health O Meter Inc. v. Terraillon Corp.*, 873 F.Supp. 1060, 1173 (N.D. Ill. 1995).

certain, satisfying and persuasive than direct evidence.” *Michalic v. Cleveland Trunkers, Inc.*, 364 U.S. 325, 330, 81 S.Ct. 6, 11 (1960); *see also Minemyer v. B-Roc Representatives, Inc.*, 678 F. Supp. 2d 691, 704-05 (N.D. Ill. 2009); *Sylvester v. SOS Children's Villages Illinois, Inc.*, 453 F.3d 900, 903 (7th Cir. 2006); *and see* Federal Civil Jury Instructions of the Seventh Circuit 1.12 (“The law makes no distinction between the weight to be given to either direct or circumstantial evidence.”)

These general principles aside, trade dress protection supports a specific and important policy consideration striking at the heart of intellectual property law – namely, advancing the economic policies of trademark law, a principal one of which is to reduce consumers’ search costs by “quickly and easily assur[ing] a potential customer that *this* item – the item with this mark – is made by the same producer as other similarly marked items that he or she liked (or disliked) in the past.” *Qualitex Co. v. Jacobson Products Co.*, 514 U.S. 159, 164 (1995). Beyond that, trade dress emphasizes the law’s encouragement of investment in brand development and, by corollary, the discouragement of free-riding. Specifically, trade dress protection “helps assure a producer that it (and not an imitating competitor) will reap the financial, reputation-related rewards associated with a desirable product.” *Id.* And it likewise and conversely discourages those who hope to sell inferior products by capitalizing on a consumer’s inability quickly to evaluate the quality of an item offered for sale. *Id.* at 164.

The enforcement of that policy ensures that source identifying characteristics are afforded the protection they deserve and the consuming public expects. The Sixth Circuit found in *Ferrari S.P.A. v. Roberts*, for example, that the shape and design of specific Ferrari models had penetrated the marketplace sufficiently to preclude the defendant from selling fiberglass kits that would allow one to make a non-Ferrari car look like a Ferrari model: “Ferrari charges, and the district court found, that the unique and distinctive shape and design of the Daytona Spyder and the Testarossa are protected trade dress which Roberts has infringed by copying them and marketing his replicas.” 944 F.2d 1235, 1239 (6th Cir. 1991); *see also Gurglepote, Inc. v. New Shreve, Crump & Low LLC*, 153 F.Supp.3d 441, 449 (D. Mass 2015) (public association with distinctive shape and appearance of plaintiff’s goods render it protectable trade dress).

Kellytoy has plainly established a secondary meaning under these principles. It has created certain finite and distinguishable characteristics that are consistent through its line of Squishmallow toys, and which serve a clear source identifying function to the consuming public. Those features are described above, and include the egg/bell shape with no proportionate, pronounced limbs (the absence of which amplifies the distinctive shape), the Asian Kawaii faces and complementary rounded graphics, embroidered facial features, distinctive monochrome coloring and short pile velvety texture and silky memory-foam-like stuffing. (Decl. Yoon ¶ 10.)

The fact that these characteristics were the product of deliberate design decisions emphasizes the uniqueness of the Squishmallows' look and feel. As Ms. Yoon explains in her declaration, the product creators at Kellytoy consciously crafted the shape and look of the Squishmallow line to reflect a specific artistic expression that would immediately be identifiable by the consuming public, and would in turn identify Squishmallows to the exclusion of all other plush toys. (*Id.* ¶ 12.) And they did so by surveying the marketplace for purposes of tracking the standard features of these toys and designing products that maintained consistent and combined qualities that **are not** found on competing toys. (*Id.* ¶ 13.) Nor is there any reasonable doubt that Squishmallows' combination of features is unique in the marketplace. As noted above, Richard Gottlieb, the toy industry expert, explained – as noted above – he has “never seen a single plush toy incorporating all of these features and otherwise being expressed quite the way they appear in the Squishmallows.” (Decl. Gottlieb, ¶ 16.) The Squishmallows features, in other words, present an abstract, and yet identifiable, expression of the animals that are included in the line, and they consequently reflect a look and feel that is unique to Kellytoy's plush goods.

That commercial reality is a matter of undeniable fact in the marketplace, nor is there any doubt that Squishmallows have penetrated the consciousness of the consumer, and acquired durable secondary meaning.

The amount and volume of advertising. As a starting point, Kellytoy's advertising campaign evidences the extent to which consumers have embraced the look and feel of Squishmallows as source identifying features under *Thomas & Betts, supra*. Mr. Grody – a principal at Tellum Grody Public Relations, Inc. (“TGPR”) – and Elisa Vazquez of Kellytoy

establish, among other things, that TGPR has overseen the Squishmallows marketing campaign since 2017 and has been stunned by the level of consume recognition and engagement with the campaign. Mr. Grody recounts, for example, that (1) the dedicated Squishmallows.com website receives in excess of 5,500 visits *per day* on its website traffic consistently ranks in the top 50,000 for U.S. sites (and top 125,000 for global sites) and recorded as high as 14,162 in the U.S. in December 2019⁴; (2) Squishmallows currently has over 104,000 Instagram followers, over 80,000 Facebook followers, and more than 10,000 Twitter followers; (3) Squishmallows has more than 28.5K organic posts on Instagram that use the official hashtag (#Squishmallows), and the average Squishmallows post likes on Instagram hovers at over 3000+ per post and 100+ average comments per post; (4) through public relations activities alone, not including paid advertising, Kellytoy's Squishmallows branded plush toys have garnered over 200 MILLION media impressions, including paid placement on Facebook and Instagram since July 21, 2017 that total 23.6 MILLION unique individuals and 83.7 MILLION impressions; and (5) digital advertisements used by Kellytoy to advertise its Squishmallows plush toys in conjunction with specific retailers have yielded average click through rates of 30+%, while the industry average is about 1-2%. (Dec. Grody ¶ 10-13.)

Volume of Sales. Mr. Grody emphasizes that the extent of consumer response to the Squishmallows campaign in such a short time is unprecedented in his experience, and the data to which he testifies – and the testimony of Mr. Gottlieb, the toy industry expert – establish that the Squishmallows trade dress has acquired secondary meaning. (Decl. Grody ¶ 9; Decl. Gottlieb ¶ 16.) And the remaining *Thomas & Betts* factors merely serve to confirm that obvious legal conclusion. The volume of Squishmallows sales, to take one particularly apropos example, squares directly with the data and observations of Messrs. Grody and Gottlieb. Squishmallows have sold and shipped approximately 40,000,000 (40 million) units since 2017, a figure in

⁴ To put this into context, there are nearly 1 3/4 billion websites available on the World Wide Web. (Mizrahi Decl., at ¶ 2.) As one might expect, the most popular websites the United States are Google, YouTube, Facebook, Amazon – with Apple.com being at number 30. (Mizrahi Decl., at ¶ 3.)

harmony with the consumer response Mr. Grody recites and the particularized characteristics Mr. Gottlieb focused upon. (Decl. Grody ¶¶ 13-14; Decl. Gottlieb ¶ 10.) Ms. Yoon amplifies those facts, explaining that in twenty years as a primary toy manufacturer Kellytoy has never experienced anything like the explosion of Squishmallows popularity. (Decl. Yoon ¶ 27.)

Length and manner of use. The Grody and Yoon Declarations demonstrate that Squishmallows have been consistently and continuously been sold in the marketplace since 2017, and they have always included the features discussed above and which embody the product’s trade dress. It is those abstract features and the consistency of their use that distinguishes Kellytoy’s Squishmallows from its competitors. And Kellytoy’s advertising educates the consuming public concerning those features through “look for” advertising. Ms. Yoon explains in her declaration, for example, that Kellytoy’s press releases, social media sites, marketing materials and stationary all expressly states that the “shape, look, feel, and texture of Squishmallows® branded plush toys constitute Kellytoy Worldwide, Inc.’s proprietary trade dress.” (Decl. Yoon ¶¶ 18-21.)

Consumer Evidence. The widespread evidence discussed above is substantiated by direct consumer evidence of source identifying recognition. Ms. Yoon again provides particulars, including among other things that the Google search engine yields over 1,370,000 “hits” for Squishmallows, and Mr. Grody additionally recounts the voracious consumer appetite for these products in his declaration. (Decl. Yoon ¶ 16, Grody ¶¶ 13-14.) But within the perpetual stream of public commentary on social media concerning Squishmallows is specific consumer recognition that there are “official” Squishmallows. A sampling of Facebook posts demonstrate in fact the products’ many fans search high and low for Squishmallows they have not previously seen and which they want to add to their collection – and knock off brands that are the product of competitors’ efforts to confuse the public into believing that their imitation goods are in fact made by the same manufacturer as Squishmallows. This evidence, in short, demonstrates that: (1) the consuming public has identified Squishmallows resolutely; (2) a sub-culture of Squishmallows followers has formed, and which communicates with one another about Squishmallows through social media; and (3) this degree of devotion and continuous

commentary is, in the plush toy industry, particular to Squishmallows. (Decl. Vazquez ¶ 15.)

Media Coverage/Industry Recognition. Squishmallows have been the subject of repetitive and extensive media coverage. Ms. Vazquez sets out in her declaration, for example, a long list traditional and internet press coverage that has focused on these goods, coupled with a steady stream of media events and trade publications that likewise have focused on Squishmallows. (Decl. Vazquez ¶¶ 20-31.) To name just a few, Squishmallows were featured in issues of *OK! Magazine*, *L.A. Parent Magazine*, *City Parent Magazine*, and *San Diego Family Magazine* and included in the 2017, 2018, and 2019 gift guides for various publications, including in *The Washington Post*, *The Houston Chronicle*, E! News, and *L.A. Parent*. (Decl. Vazquez ¶ 22.) That is in addition to the numerous industry awards these goods have received, and which are mentioned above. (*Id.* ¶ 10.) This collectively supplements the myriad evidence already assembled concerning secondary meaning, and serves to confirm what that evidence makes obvious – Squishmallows possess protectable trade dress.

Deliberate Copying. That Ty deliberately copied the Squishmallows Trade Dress is beyond any reasonable dispute. Ty transparently and self-consciously copied that trade dress in its effort to convert the goodwill Kellytoy has generated in its Squishmallows plush toys. Lest there be any doubt, Mr. Gottlieb – the industry expert – makes clear that Ty decided to “fully duplicate the look and feel of the Squishmallows trade dress.” (Decl. Gottlieb ¶ 22.) Indeed, Ty has not merely created an outwardly similar product, but Ty has self-consciously copied details that relate “specifically to the combined characteristics that make Squishmallows unique in the marketplace.” (*Id.* ¶ 21.) This is, in short, deliberate and willful copying. (*Id.* ¶ 20.)

2. **The Squishmallows Trade Dress is non-functional**

To be protectable, trade dress, *as a whole*, cannot be solely functional. *See Bodum*, 927 F.3d at 491. Functionality must be analyzed by reference to the overall combination and arrangement of the various features – not on the functionality of each of the individual features. *Badger*, 13 F.3d at 1154; *Logan Graphic Prod., Inc. v. Textus USA, Inc.*, No. 02 C 1823, 2003 WL 21011746, at *4 (N.D. Ill. May 5, 2003).

That said, a product’s trade dress may have a “function” in the everyday meaning of the

term without being “functional” within the meaning of trademark law. *See Bodum*, 927 F.3d at 492. A French press coffeemaker has, for example, protectable trade dress in the product’s overall appearance even though all of the product design elements have functions, including a handle, lid, feet at the bottom, and a round knob for the strainer. *Id.* (“[T]o establish it has a valid trade dress, [the plaintiff] did not have to prove that something like a handle does not serve any function. It merely needed to prove that preventing competitors from copying the [French press’s] particular design would not significantly disadvantage them from producing a competitive and cost-efficient French press coffeemaker.”). Thus, the defendant may not copy the plaintiff’s combination of these elements even where the plaintiff could not claim trade dress in an individual element. *Id.* at 493.

Functionality may not, in that regard, be used to defeat trade unless that trade dress *as a whole* is “essential to the use or purpose of the article or if it affects the cost or quality of the article,” or if its use is “a competitive necessity” because not using the trade dress would put competitors at a significant non-reputation-related disadvantage. *Id.* at 491 (quoting *Qualitex*, 514 U.S. at 165). In assessing that question, the Seventh Circuit courts consider: (1) the existence of a utility patent, expired or unexpired, that involves or describes the functionality of an item’s design element; (2) the utilitarian properties of the item’s unpatented design elements; (3) advertising of the item that touts the utilitarian advantages of the item’s design elements; (4) the dearth of, or difficulty in creating, alternative designs for the item’s purpose; (5) the effect of the design feature on an item’s quality or cost. *Id.* (citing *Ga.–Pac. Consumer Prods. LP v. Kimberly–Clark Corp.*, 647 F.3d 723, 727–28 (7th Cir. 2011)). No single factor is dispositive and courts consider each factor separately. *Id.*

- a. *The Squishmallows Trade Dress does not have any design elements that have been subject to a utility patent*

The first factor weighs in favor of non-functionality. Kellytoy has never filed for a utility patent for the Squishmallows plush toy as a whole, or for any element thereof. (Decl. Yoon ¶ 41.)

b. *The Squishmallows Trade Dress provides no utilitarian advantage*

When viewed as a whole – as required under applicable law – the Squishmallows Trade Dress cannot reasonably be characterized as providing a utilitarian advantage. The subject goods comprise plush toys, rather than utilitarian goods such as tools, chairs, etc. In addition, the claimed trade dress does not include clasps or other functional features. Rather, it is comprised of elements of design and aesthetics, calculated to provide a unique/distinguishing “look and feel” across a line of plush toys to identify them as genuine Squishmallows.

As explained above, and in light of their overall shape, the Squishmallows plush toys embodying the Squishmallows Trade Dress lack a discrete head or torso or pronounced/proportionate limbs. They are, in fact, highly abstracted renditions of animals or other creatures, designed to conjure images of the creatures they depict but without accurately representing their physiognomy. The limbless egg/bell shape of Squishmallows does not provide any utilitarian advantage over the countless alternative shapes available, such as round, square, oblong, or realistic to an animal’s shape.

Despite that, Ty suggested in prior correspondence that “the oval pillow shape of Kellytoy’s products is functional for the additional reason that the oval shape permits the product to sit upright for display or play, while still maintaining a pillow like appearance with a tapered and smaller area for display of the head portion of the product.” Setting aside for the moment that the capacity to sit upright provides *no net advantage*, this self-serving assertion ignores the fact that, if designing a toy that could sit in this manner was the purpose, Kellytoy could easily have achieved the same goal by shaping them as flat bottomed and flat topped ovals, squares, rectangles, spheres, etc. Stated another way, having them taper towards the top represents a design choice, not a utilitarian/functional choice.

Regardless, Squishmallows do not reliably stand. It takes little if anything to knock them over, and the fact that they are typically handled by children while sitting on the retailer’s shelves will all but ensure that they will not be standing upright for very long, unless independently supported. More to the point, if standing upright provided a utilitarian advantage, Kellytoy would have designed Squishmallows to stand up more stably, e.g., as squares,

rectangles, triangles, spheres, cylindrical, oblong/lateral pillows, etc. or with a much wider base relative to the upper portion. (Decl. Yoon ¶ 37.) The same holds true for having them stand up for purposes of play – they lack the stability to support the allegation that their shape was dictated by utilitarian considerations. (*Id.*)

In any event, an ability to stand does not make the Squishmallows Trade Dress functional because consumers do not select Squishmallows for their ability to stand. Indeed, numerous social media posts by Squishmallows consumers show the products on their sides, backs, and being held by users as does numerous posts/advertisements placed by Kellytoy. (*See* Decl. Vazquez ¶ 35, Ex. F.) Thus, standing is not essential to the use or purpose of Squishmallows.⁵

Even if eyes, mouths, or coloring have a function in stuffed animals, Ty is not free to copy the look and feel created by Kellytoy’s selection of the combination of these features. *See Bodum*, 927 F.3d at 492. The Squishmallows Trade Dress expresses those features in its own way giving Kellytoy’s Squishmallows a distinctive overall look and feel, especially when viewed in combination with the other features of the Squishmallows Trade Dress. If a plaintiff “seeks to protect the overall look of its product – the combination and arrangement of the various features – the appropriate inquiry focuses on the overall trade dress and not on the individual features.” *Logan*, 2003 WL 21011746, at *4. In our case, rather than copying the overall look and feel of Squishmallows, Ty could have employed countless other features that would not infringe Kellytoy’s trade dress. *See supra*; *see also Bodum*, 927 F.3d at 492 (combination of functional elements still trade dress because competitor could have used alternative designs of the elements); *Service Ideas, Inc. v. Traex Corp.*, 846 F.2d 1118, 1123–24 (7th Cir. 1988).

This merely serves to confirm what is obvious – no particular element of the Squishmallows Trade Dress provides a utilitarian advantage, much less all the elements in

⁵ The remaining elements of the Squishmallows Trade Dress are likewise nonfunctional. In addition to their unusual shape (with the absence of discrete head and torso or proportionate limbs), further supporting their abstracted overall appearance, they also possess simplified Asian style Kawaii faces with repeating and complementary rounded/oval shaped graphics depicting features on the characters themselves (such as eyes, snouts and bellies) and which conform to and support the overall egg/bell shape of the toys; (3) embroidered facial features, such as nostrils, and/or mouths; (4) distinctive contrasting and non-monochrome coloring.

combination. Rather, Kellytoy designed the Squishmallow Trade Dress – with its unitary aesthetic across its Squishmallows line – to distinguish the source of products embodying the Squishmallow trade dress from the source of other toys. (Decl. Yoon ¶ 48.)

c. *Kellytoy has not advertised utilitarian advantages of Squishmallows*

Kellytoy has never advertised any utilitarian advantages of its Squishmallows, other than the fact that the Squishmallows can be used as pillows – something that holds true for the vast majority of plush toys. (Decl. Yoon ¶ 42.) Kellytoy has never advertised that the Squishmallows stand or sit on their bottoms. (Decl. Vazquez ¶ 34.)

d. *Many alternate designs for stuffed animals exist*

The existence of competing product designs indicates a trade dress is non-functional. *See Logan*, 2003 WL 21011746, at *4 (“[I]t is appropriate at [the preliminary injunction] stage to consider the existence of alternative designs in the marketplace when determining whether product features are functional.”). As noted above, alternate and non-infringing designs are not just available, but are in wide use in the marketplace. (Decl. Yoon ¶ 46.) Ty itself sells, in fact, numerous lines of plush toys that do not co-opt the Squishmallows Trade Dress. (*Id.* ¶ 43.) It cannot reasonably be disputed as a result that ample alternate designs are available. *See Bodum*, 927 F.3d at 493 (concluding that “ample evidence” exists of alternate designs where both litigants manufactured products with different design elements).

The shape, appearance, texture, and feel of the Squishmallows plush toys are all aesthetic features as to which there are innumerable alternatives. (Decl. Yoon ¶¶ 42–44.) Kellytoy designed the Squishmallows shape, appearance, texture, and feel to distinguish the Squishmallows from other toys. (Decl. Yoon ¶ 9.) There are also numerous alternative designs in the marketplace that abstractly depict animals and other creatures – without discrete heads and torsos and without proportionate limbs – that do not infringe upon the Squishmallows Trade Dress. While they possess some of the elements of the Squishmallows Trade Dress, they critically differ in shape and thus avoid infringement. (*See* Decl. Yoon ¶¶ 42–44 for examples.)

e. *The Squishmallows Trade Dress does not affect quality or costs*

Kellytoy did not select the features of the Squishmallows Trade Dress for purposes of

increasing quality or reducing costs. Kellytoy could have, as noted, chosen alternative designs that are less expensive to produce. (Decl. Yoon ¶¶ 11-12.) Kellytoy uses an ultra-silky polyester fill for the Squishmallows stuffing, for example, and alternate fillings are available for stuffed toys that are less expensive, such as regular polyester stuffing and 3D light weight stuffing. (*Id.*) Likewise, Kellytoy could have chosen ways to depict nostrils, mouths, and other features that are less expensive than embroidering those features. (*Id.*) Less expensive alternatives to embroidery include printing and sublimation printing. (*Id.*) The short-pile velvety velour-like textured exterior provides no cost savings. Other less expensive available exterior materials include Tricot, EF Velboa and Velboa. (*Id.*) And Ty, for its part, could have selected any number of alternatives designs that would have worked equally well from a cost of goods and ease of manufacture standpoint but would not have provided the overall look and appearance that Kellytoy sought for its Squishmallows plush toy line. (*Id.*) The same holds true for the Squishmallows egg/bell shape. That shape provides no manufacturing cost savings; other shapes such as squares, circles, triangles are equally, or less, expensive to manufacture. (*Id.*)

3. **Customers are likely to be Confused**

A defendant's product infringes the plaintiff's trade dress if the plaintiff shows that similarity of the defendant's trade dress to that of the plaintiff's creates a likelihood of confusion on the part of consumers as to the source of the goods. 15 U.S.C. § 1125; *Badger*, 13 F.3d at 1151; *Top Tobacco v. Fantasia Distribution Inc.*, 101 F. Supp. 3d 783, 788 (N.D. Ill. 2015).

Courts in the Seventh Circuit consider seven factors when analyzing the likelihood of confusion: (1) similarity between the marks in appearance and suggestion; (2) similarity of the products; (3) area and manner of concurrent use; (4) degree of care likely to be exercised by consumers; (5) strength of the plaintiff's mark; (6) actual confusion; and (7) intent of the defendant to "pass off" his product as that of another. *Top Tobacco*, 101 F. Supp. 3d at 789 (citing *Packman v. Chicago Tribune Co.*, 267 F.3d 628, 643 (7th Cir. 2001)). No single factor is dispositive, and a plaintiff need not allege facts for all factors. (*See id.*) The weight a court assigns to any factor will depend on the facts and circumstances of the case. *See Ty*, 237 F.3d at 898 (affirming preliminary injunction obtained by maker of beanie baby plush toys).

- a. *The Squishmallows Trade Dress and the Infringing Plush are similar in appearance and suggestion*

The first factor weighs in favor of a likelihood of confusion if the plaintiff's and the defendant's products outwardly are similar in appearance. *See Badger*, 13 F.3d at 1152. Here, the Infringing Plush toys are outwardly similar in appearance to Squishmallows. As can be readily seen from an inspection of the Infringing Plush, the Infringing Plush contain all of the visual elements of the Squishmallows Trade Dress, including the overall bell/egg shape without distinct heads and torsos, both depict animals/creatures without proportionate and pronounced appendages; abstract, Asian style Kawaii faces with repeating and complementary rounded/oval shaped graphics and embroidered facial features; and contrasting and non-monochrome coloring. (Decl. Mizrahi, Ex. I.) One can also tell through visual inspection and that the Infringing Plush contain a very soft, short pile outer shell similar to the Squishmallows. (*Id.*) As can readily be inferred from the name assigned by Ty to the Infringing Plush, namely, Squish-a-Boos, that they possess a mooshy filling. (*Id.*) A buyer who had access to Ty's Squish-a-Boos during a recent tradeshow confirmed to Kellytoy that the Infringing Plush possess a similar shell material and "mooshy" feel reasonably Squishmallows. (Decl. Rauch ¶ 3.) Mr. Gottlieb puts the question to rest, opining that when coupled "with a sounds-like name, Squish-A-Boo, makes for a product that consumers will easily confuse with the Squishmallows product." (Decl. Gottlieb ¶ 22.)

Significantly, Mr. Gottlieb confirms that Ty took the features that distinguish the Squishmallows line from the goods of others (e.g., the shape, the lack of limbs, and the abstract features) and incorporated them into the Infringing Plush. (Decl. Gottlieb ¶ 19.)

Nonetheless, to the extent the products may contain minor differences, such as Ty using larger eyes, those differences do not defeat the likelihood of confusion because the courts, in analyzing similarity, do not consider the products side-by-side, but instead consider the conditions of the marketplace. *See Ty*, 237 F.3d at 899; *Int'l Kennel Club*, 846 F.2d at 1088; *see also Malletier v. Burlington Coat Factory Warehouse Corp.*, 426 F.3d 532, 537 (2nd Cir. 2005) (reversing denial of preliminary injunction because district court compared the products side-by-side rather than considering the market conditions).

Here, consumers are unlikely to distinguish between genuine Squishmallows and the Infringing Plush based on the larger eyes or other minor differences. As discussed more below, the target customer for Squishmallows are children between 5 and 14. (Decl. Gottlieb ¶ 23.) Those children are unlikely to remember the details of the product, aside from the general look and feel, and they might request Squishmallows from their parents, who later purchase the products without the children present. The parents may not be aware of the minor differences between Squishmallows and the Infringing Plush.

Even if consumers later notice differences between Squishmallows and the Infringing Plush, “[i]nitial interest confusion, which is actionable under the Lanham Act, occurs when a customer is lured to a product by the similarity of the mark, even if the customer realizes the true source of the goods before the sale is consummated.” *Promatek Indus., Ltd. v. Equitrac Corp.*, 300 F.3d 808, 812 (7th Cir. 2002), as amended (Oct. 18, 2002). The similarities discussed above allow Ty to profit from customers’ initial interest confusion.

b. *Squishmallows and the Infringing Plush are similar goods*

The plaintiff’s and defendant’s products are considered similar in type if the buying public would reasonably think they come from the same source, or are affiliated with, connected to, or sponsored by, the same source. *Ty*, 237 F.3d at 900; *Top Tobacco*, 101 F. Supp. 3d at 790; *KJ Korea, Inc. v. Health Korea, Inc.*, 66 F. Supp. 3d 1005, 1015 (N.D. Ill. 2014). For example, the public may presume products come from the same source when “the objects are similar in that they are small stuffed objects that are soft, pellet-filled, eight to nine inch plush toys made from velboa-type fabric.” *Ty*, 237 F.3d at 899–900. This factor is further supported if the plaintiff and defendant are in the same industry. *Top Tobacco*, 101 F. Supp. at 790.

In this case, the Infringing Plush and the Squishmallows comprise the same types of goods. As described above, Squishmallows and the Infringing Plush are both similar sized plush toys, of similar shape and feel, and marketed to the same consumers. Thus, this factor further supports the conclusion that the buying public is likely to think Squishmallows and the Infringing Plush are associated or originate from a common source.

c. *Squishmallows and the Infringing Plush are sold in the same area*

For the third factor, courts consider the products' geographical areas of distribution; whether the products directly compete with each other; whether products are sold to consumers in the same type of store; and whether the products are sold through the same marketing channels. *Top Tobacco*, 101 F. Supp. 3d at 790–91. Facts supporting the third factor include both products being advertised nationwide (*KJ Korea*, 66 F. Supp. 3d at 1016); that both products being sold in the same city (*id.*); both products being sold in the same type of retail stores or same sections of stores (*Top Tobacco*, 101 F. Supp. 3d at 791). The area and manner of concurrent use favors a finding of likelihood of confusion if the products directly compete for customers. *See Badger*, 13 F.3d at 1152.

Squishmallows and the Infringing Plush are sold in the same area. In fact, Squishmallows are sold in hundreds of retailers nationwide, including the largest retailers in the country, such as Walgreens, Fred Meyer, Kroger, and CVS, among others, many of the same nationwide retailers through which Ty has historically sold its plush toys. (Decl. Yoon ¶¶ 22, 31.) Squishmallows and the Infringing Plush have even appeared at the same trade show, the Atlanta International Gift & Home Furnishings Market. (*See* Declaration of Andrew J. Rauch (“Decl. Rauch”) ¶ 3.) Kellytoy is also informed that Ty intends to display the Infringing Plush at Toy Fair New York, scheduled to take place February 22–25, 2020, considered the most important and most attended tradeshow in the United States. (*See* Decl. Yoon ¶ 334) This factor, too, weighs in favor of a finding of “likelihood of confusion.”

d. *The consumer's degree of care*

Although people of all ages purchase Squishmallows, the target customers are children between 5 and 14. (Decl. Gottlieb ¶ 23.) While children can be expected to recall the overall “look and feel” of a product or product line, one outside of the presence of such toys, children are unlikely to remember the fine details of the product. (*Id.*) Moreover, the children often request toys from their parents, who in many cases later purchase the products without the children present. (*Id.*) The parents may not be aware of the minor differences between Squishmallows and the Infringing Plush. Moreover, Squishmallows are not expensive, generally

ranging from \$2.99 to \$19.99, and are frequently impulse buys. (Decl. Yoon ¶ 38.) The more widely advertised, accessible and inexpensive the products, the more likely that consumers will exercise a lesser degree of care and discrimination in their purchases. *See Cae, Inc. v. Clean Air Engineering, Inc.*, 267 F. 3d 660, 683 (7th Cir. 2001). These factors, according to Mr. Gottlieb, increase the likelihood of consumer confusion. (Decl. Gottlieb, ¶ 24.)

e. *The Squishmallows Trade Dress is strong*

To determine the strength of the plaintiff's trade dress, courts "examine the distinctiveness of the mark, or more precisely, its tendency to identify the goods sold under the mark as emanating from a particular source." *Top Tobacco*, 101 F. Supp. 3d at 791. Relevant evidence includes the amount of advertising and the amount of sales. *See id.*; *KJ Korea*, 66 F. Supp. 3d at 1016.

Here, the Squishmalows Trade Dress is strong for all the reasons described above. Indeed, the evidence assembled and recited in demonstrating that these goods have attained secondary meaning establishes, by corollary, the obvious strength of the Trade Dress and its resonance with the consuming public. *See supra*. Finally, to maintain its strength, Kellytoy has vigorously protected it in the marketplace against infringements via multiple lawsuits (not to mention disputes resolved through demand letters). (Decl. Mizrahi ¶ 4.)

f. *Actual confusion*

"Although evidence of actual confusion, if available, is entitled to substantial weight in the likelihood of confusion analysis, this evidence is not required to prove that a likelihood of confusion exists." *KJ Korea*, 66 F. Supp. 3d at 1016. A lack of evidence of **actual** confusion is not dispositive of the **likelihood** of confusion, and a plaintiff need not introduce, for example, a market survey evidencing likelihood of confusion. *Top Tobacco*, 101 F. Supp. 3d at 792 (citing *CAE, Inc. v. Clean Air Eng'g, Inc.*, 267 F.3d 660, 685 (7th Cir. 2001)); *see also Badger*, 13 F.3d at 1153. Here, Ty's infringing goods have not yet been released for general public sale, and thus no evidence of actual confusion can or could be available. That said, Kellytoy already has direct evidence demonstrating that actual confusion almost certainly will ensue if Ty's products are permitted to go to market. Specifically, Andrew Rauch, a Kellytoy Vice-President, testifies by

way of his Declaration that a Kellytoy customer (i.e., a retail buyer) informed him on January 15, 2020 – while attending a trade show in Atlanta – that Ty was selling or promoting products “very similar” to Squishmallows. (Decl. Rauch ¶ 3.) The import of that testimony is clear – if a Kellytoy customer/buyer is taking the time to identify the similarity of these goods to Kellytoy, before Ty’s infringing goods are in release, subsequent and actual customer confusion is a practical inevitability if Ty ultimately releases its products on a widespread basis.

g. *Ty intended to palm off its products as Squishmallows*

Ty has a history in the toy market of entering after a market is established and competing with confusing products. Rather than innovate, Ty looks to competitors for new product ideas and, in many cases, undercuts the pricing for the originals and used its well-established distribution network and significant capital to establish itself as the market leader for its knockoff products – essentially drowning out the originals in the marketplace. (Decl. Yoon ¶ 53.) By way of example, a competitor created the Jellycat® Pom Poms toy, and Ty copied the look and feel with a toy under its Beanie Boo line, as depicted in the Yoon declaration. (*Id.* ¶¶ 55-56.) A competitor created the YooHoo & Friends toys, and Ty copied the look and feel under its Beanie Boos line, as depicted in the declaration. (*Id.* ¶¶ 57-58.) A competitor created the Tsum Tsum toy, and Ty copied the look and feel with a toy under its Teeny Tys line, as depicted in the declaration. (*Id.* ¶ 59.) Thus, Ty intended to enter the market that Kellytoy established for Squishmallows and trade of the Squishmallows good will.

C. Kellytoy Will Suffer Irreparable Harm Absent A Preliminary Injunction

The Seventh Circuit has “clearly and repeatedly held that damage to a trademark holder’s goodwill can constitute irreparable injury for which the trademark owner has no adequate legal remedy.” *Luxottica USA LLC v. P’ships & Unincorporated Ass’ns Identified on Schedule “A,”* 2015 WL 3818622 (N.D. Ill. 2015), citing *Re/Max N. Cent., Inc. v. Cook*, 272 F.3d 424, 432 (7th Cir. 2001). Irreparable injury “almost inevitably follows” when there is a high probability of confusion because such injury “may not be fully compensable in damages.” *Helene Curtis Industries, Inc. v. Church & Dwight Co., Inc.*, 560 F.2d 1325, 1332 (7th Cir. 1977) (citation omitted).

If a preliminary injunction is not granted, Kellytoy will suffer loss for which there is no adequate remedy at law because: (1) Ty's infringement connects the Infringing Plush to genuine Squishmallows by causing consumer confusion regarding source and affiliation; (2) Kellytoy has no control over the manufacturing or quality control of the Infringing Plush – therefore, any quality problems related to Ty's products would be attributed to Kellytoy, resulting in damaged goodwill and undetectable lost sales; and (3) the ongoing advertising and sale of the Infringing Plush by Ty decreases the distinctiveness of the Squishmallows Trade Dress.

As detailed above, Kellytoy has made substantial investment in – and succeeded in – establishing its significant reputation and goodwill in its Squishmallows Trade Dress. In the absence of an injunction, Kellytoy will lose the value of that investment. The net result will be damage to Kellytoy in the form of lost profits and business opportunities, which amount cannot be measured or compensated by monetary damages alone. Further, unabated infringement will encourage others to use Kellytoy intellectual property without a license.

In addition, Ty has hijacked that reputation to sell competing products over which Kellytoy has no control. Trademarks identify their owners and in them resides the reputation and goodwill of their owners. Thus, if Ty is permitted to infringe upon the Squishmallows Trade Dress, Ty is borrowing Kellytoy's reputation for its own goods, whose quality no longer lies within Kellytoy's control. A trademark owner's loss of the ability to control its mark, thus, creates a high likelihood for damage to its reputation. “The most corrosive and irreparable harm attributable to trademark infringement is the inability of the victim to control the nature and quality of the defendants' goods.” *Int'l Kennel Club*, 846 F.2d at 1092.

Kellytoy employs rigorous quality controls over its Squishmallows. (Decl. Yoon ¶ 29.) But Kellytoy has no control over the quality of Ty's directly competitive Infringing Plush. Quality control does not solely relate to durability, but also to aesthetics. As close as Ty's designs are to Kellytoy's authentic Squishmallows designs, Kellytoy would never release Squishmallows bearing Ty's specific designs: they do not comport with the Squishmallows aesthetic. (Decl. Yoon ¶ 50.)

There is also the issue of safety. Plush toys are most often provided to children. If

something untoward were to occur in connection with Ty’s Infringing Plush, such “bad will” would likely be imputed to Kellytoy’s Squishmallows. Once there is a safety scare concerning a product, in the age of social media and the Internet, news in the marketplace spreads like wildfire often without the measured reflection necessary to properly distinguish Ty’s Infringing Plush from Kellytoy’s Squishmallows. The fact that Kellytoy is powerless over the design and quality of the Infringing Plush further supports a finding of irreparable harm.

D. The Irreparable Harm to Kellytoy Outweighs The Potential Harm Ty Would Suffer Were A Preliminary Injunction Wrongfully Granted

Comparatively, the potential harm to Ty is insignificant. First, Ty will simply be prevented from willfully infringing Kellytoy’s Squishmallows Trade Dress and from trading on Kellytoy’s goodwill – actions Ty never had the right to do in the first place. *See Ty*, 237 F.3d at 903 (When assessing the harm to the alleged infringer, “the court excludes the burden it voluntarily assumed by proceeding in the face of known risk.”) In fact, Ty’s wrongful conduct towards Kellytoy is part of its modus operandi in the marketplace, where it has done the same thing to others. (Decl. Yoon ¶¶ 53-59.) It should not be allowed to succeed, again, here.

Second, Ty, in contrast to Kellytoy, is a newcomer to the market with its Infringing Plush, without an established market position and brand strength. An injunction barring Ty from violating the Squishmallows Trade Dress will not substantially impede Ty’s ability to do business. It could simply change the design of the Infringing Plush – which, to Kellytoy’s knowledge, has not yet been distributed to Ty’s customers. Kellytoy wrote to Ty on January 16, 2020 informing it of Kellytoy’s claims to the Squishmallows Trade Dress; to the extent that Ty continued to invest in the Infringing Plush and take orders therefor, it should only have itself to blame. (Decl. Mizrahi ¶ 5.) Regardless, Ty will not be put out of business: Ty sells numerous other successful lines of plush toys and can continue to sell those to its customers – it simply cannot infringe on the Squishmallows Trade Dress. This balance, in short, favors granting injunctive relief. *See Ty*, 132 F.3d at 1172.

E. The Public Interest Will be Served By Granting the Injunction

The public interest will be served by granting Kellytoy’s request for a preliminary

injunction, as it will prevent consumer confusion. *Eli Lilly & Co. v. Natural Answers, Inc.*, 233 F.3d 456, 469 (7th Cir. 2000) (“[T]he public interest is served by the injunction because enforcement of the trademark laws prevents consumer confusion.”). Indeed, the gravamen of trademark protection is the right of the public to be free of confusion, along with the right of the trademark owner to control its reputation and its products’ reputation; therefore, preventing Ty from infringing the Squishmallows Trade Dress and other of Kellytoy’s rights promotes the interests of the public. *See id.* Granting of the requested injunction is in the public’s interest.

F. Injunction Bond

The amount of the security bond under Federal Rule of Civil Procedure 65(c) is in the discretion of the Court. *See Scherr v. Volpe*, 466 F.2d 1027, 1035 (7th Cir. 1972). The Seventh Circuit has determined that a strong likelihood of success is a major factor which could weigh heavily in favor of waiving a bond requirement. *Id.* Because of the strong and unequivocal nature of Kellytoy’s evidence of trade dress infringement, and the fact that Ty will retain possession of its inventory and thus could sell it at a later date, Kellytoy asks this Court to require Kellytoy post a bond of no more than ten thousand U.S. dollars (\$10,000.00). *See, e.g., Deckers Outdoor Corporation v. The Partnerships, et al.*, 2013 WL 1337616 (N.D. Ill. March 27, 2013) (setting \$10,000 bond).

IV. CONCLUSION

For the reasons set forth above, Kellytoy asks this Court to grant the Motion, enter the proposed order submitted to the Court, and enjoin Ty from selling, offering to sell, causing to be sold, disseminating, importing, distributing, circulating, promoting, marketing, advertising, or in any way commercially exploiting the Infringing Plush within the United States.

Dated: February 21, 2020

Respectfully submitted,

By: /s/ Dean D. Niro

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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

KELLYTOY WORLDWIDE, INC. and)	Case No. 1:20-cv-00748
KELLYTOY (USA), INC.,)	
)	Honorable Gary Feinerman
Plaintiffs,)	
)	
vs.)	
)	
TY INC., and DOES 1-10,)	
)	
Defendants.)	
)	

**DECLARATION OF JEANNE YOON IN SUPPORT OF PLAINTIFF'S
MOTION FOR PRELIMINARY INJUNCTION**

I, Jeanne Yoon, declare and state as follows:

1. I am over eighteen years of age and I have personal knowledge of the facts set forth herein. If called upon to testify I would do so to the same effect.
2. I am an employee of Kellytoy Worldwide, Inc. ("Kellytoy Worldwide") and a resident of Los Angeles County, California.
3. I make this declaration in support of Kellytoy Worldwide, Inc.'s Motion for Preliminary Injunction against Ty Inc.
4. I have been employed by Kellytoy since May 2003 as serve as its Senior Vice President of Sales and Product Development.
5. As the Senior Vice President of Sales and Development of Kellytoy Worldwide, I am responsible for managing and overseeing Kellytoy Worldwide's design of its plush toys and its retail development activity of the various brands distributed by Kellytoy Worldwide, particularly in the United States and China. My responsibilities also include sales, including sales presentation, pricing, and all follow-ups, for a majority of the

mass market, including drug store chains, grocery, and club stores. I also oversee import and domestic sales for Kellytoy Worldwide.

6. Unless stated herein to the contrary, each document relied on or referenced in this declaration has been kept in the course of a regularly conducted business activity, and it has been the regular practice of Kellytoy to create and maintain these records as part of its regularly conducted business activity.

7. Due to my position as Senior Vice President of Sales and Product Development, I am generally familiar with the facts of this case.

8. Kellytoy Worldwide is engaged in the business of creating, manufacturing, distributing and selling unique plush toys, including, without limitation, its highly successful and famous Squishmallows line of plush under the SQUISHMALLOWS brand ("Squishmallows"). Among Kellytoy Worldwide's Squishmallows branded line of plush toys are the specific Squishmallows designs set forth in **Exhibit I** hereto.

Kellytoy Worldwide and Its Protected Intellectual Property Rights

9. In 2016, together with one of Kellytoy Worldwide's other designers, I conceived of and began creating its Squishmallows line of plush toy designs that share common, unique features that distinguish them from the goods of others (the "Squishmallows Trade Dress"). The Squishmallows line possesses unique, recognizable and distinguishing features that are common across much of the Squishmallows line.

10. We chose the specific combination of design elements comprising the Squishmallows Trade Dress for the express purpose of creating a uniquely identifiable look and feel that would distinguish Kellytoy Worldwide's line of goods from the goods of others in the marketplace and to make them identifiable to consumers as a line coming from Kellytoy Worldwide, such as the combination of: (1) the specific shape (including the lack of a discrete head and torso) lacking proportionate, pronounced limbs; (2) Kawaii, abstract, embroidered facial features; (4) oval/rounded graphic features; and (5) an ultra

soft shell and mooshy, silky stuffing.

11. Using alternate design elements from the ones discussed above would not disadvantage a competitor—other than competitors attempting to benefit from the goodwill Kellytoy has achieved in its Squishmallows Trade Dress. In fact, we did not select the features of the Squishmallows Trade Dress for purposes of increasing quality or reducing costs. We could have chosen alternative designs that are less expensive to produce. In fact, Kellytoy Worldwide has numerous plush toys that cost significantly less to produce than the plush toys in its Squishmallows line. For example, Kellytoy Worldwide uses an ultra-silky polyester fill for the Squishmallows stuffing. Alternate fillings are available for stuffed toys that are less expensive, such as regular polyester stuffing and 3D light weight stuffing. Likewise, Kellytoy Worldwide could have chosen ways to depict nostrils, mouths, and other features that are less expensive than embroidering those features, such as printing and sublimation printing. Likewise, the short-pile velvety velour-like textured exterior provides no cost savings, as numerous other less expensive available exterior materials include Tricot, EF Velboa and Velboa. The same holds true for the Squishmallows egg/bell shape. The egg/bell shape provides no substantial manufacturing or other cost savings. Other shapes such as squares, spheres, triangles are equally or less expensive to manufacture.

12. The specific features that comprise the Squishmallows Trade Dress together (including the materials and other design choices) with the resulting overall look and feel thereof were the result of deliberate design decisions made by Kellytoy Worldwide in order to create a distinctive line of plush toys that would distinguish the toys in that line from the plush toys of others. Any of the material or design alternatives described above would have worked equally well from a cost of goods and ease of manufacture standpoint, though they would not have provided the overall look and appearance that Kellytoy Worldwide sought for its Squishmallows plush toy line.¶

13. In essence, Kellytoy Worldwide – by designing goods that included this

particular combination of characteristics – created an entirely new class of plush toys that has carved a previously non-existent niche in the marketplace. And that newly created niche has spawned a cultural craze in which numerous imitators have emerged, including the Defendant.

A. Kellytoy’s Extensive Advertising and Promotional Activities

14. From 2016 to the present, Kellytoy Worldwide has embarked on a consistent campaign to develop, advertise and promote its Squishmallows through the United States. That campaign has been expensive and, in fact, Kellytoy Worldwide is spending approximately \$500,000 annually in direct to consumer and business-to-business advertising in connection with its Squishmallows line of plush toys with a total annual Squishmallows marketing budget nearing \$1,000,000. Advertising and promotion of its Squishmallows line of plush toys has been a high priority for Kellytoy Worldwide and for which Kellytoy Worldwide has expended much time and effort, in addition to money.

15. As detailed below, Kellytoy Worldwide did not just market and sell its Squishmallows line has one of many Kellytoy Worldwide plush toy offerings. Rather, it made a deliberate effort to distinguish that line has an entirely separate offering by creating a website, Facebook page, Instagram account, Twitter account, etc. dedicated solely to its Squishmallows line.

16. A simple Internet search using the Google search engine yields over 1,370,000 "hits" for the search term "Squishmallows." Attached hereto as **Exhibit 2** is a true and correct copy of a screenshot of the first page of Google showing 1,370,000 hits returned on January 28, 2020 for the search term “Squishmallows.”

17. In an effort to inform the public that overall “look and feel” of Kellytoy Worldwide’s Squishmallows plush toys comprise Kellytoy Worldwide’s proprietary trade dress, Kellytoy Worldwide includes an explicit statement to that effect on many of its marketing materials, such as its Squishmallows specific website, social media accounts, press releases, and stationary used to correspond directly with customers. Specifically, as

set forth in the below referenced exemplars from Kellytoy Worldwide's Squishmallows.com website, press releases, social media accounts, and stationery, each of these materials contains the following statement along the following lines: "The shape, look, feel, and texture of Squishmallow® branded plush toys constitute Kellytoy Worldwide, Inc.'s proprietary trade dress."

18. Indeed, in addition to marketing and selling them through thousands of retail stores nationwide, Kellytoy Worldwide markets and sells its Squishmallows on its website dedicated to its Squishmallows <squishmallows.com> featuring dozens of photographs of its plush toys and models holding its Squishmallows. This is true in spite of the fact that Kellytoy Worldwide has numerous other lines of branded plush toys. True and correct copies of printouts of pages from <squishmallows.com> are attached hereto as **Exhibit 3**. As part of Kellytoy Worldwide's marketing strategy, in order to inform the public of the fact that the "look and feel" Squishmallows comprise Kellytoy Worldwide's proprietary trade dress, Kellytoy Worldwide states as much in various marketing materials, including on the footer of its website.

19. Kellytoy Worldwide also frequently releases press releases which are picked up and published by numerous media outlets such as Yahoo! Finance, Ask.com, BusinessWire.com, HaroldOnline, among numerous others. In one such press release, Kellytoy Worldwide highlighted the fact that that Kellytoy Worldwide goes to great lengths to "emphasize inform consumers that the overall shape, look, feel, and texture of its Squishmallows branded plush toy constitutes Kellytoy's proprietary trade dress." A true and correct copy of a February 10, 2020 press release published by Yahoo! Finance is attached hereto as **Exhibit 4**.

20. Kellytoy Worldwide also promotes its Squishmallows plush toys through dedicated social media accounts under the Squishmallows brand, such as Facebook, Instagram, twitter etc. True and correct copies of printouts of pages, captured on June 28, 2019, from Kellytoy Worldwide's Squishmallows Instagram page are attached hereto as

Exhibit 5. A true and correct copy of a printout of the “About” page, captured on June 17, 2019, from Kellytoy Worldwide’s Squishmallows Facebook page is attached hereto as

Exhibit 6. A true and correct copy of a printout of the Squishmallows Twitter page, captured on June 17, 2019, is attached hereto as **Exhibit 7.** On each of these social media accounts, Kellytoy Worldwide expressly informs the public that “The shape, look, feel, and texture of Squishmallow® branded plush toys constitute Kellytoy Worldwide, Inc.’s proprietary trade dress.”

21. In fact, Kellytoy Worldwide includes a similar statement in its marketing materials, including (1) its marketing circular, a true and correct exemplar of which is attached hereto as **Exhibit 8** (distributed to numerous expected buyers and other attendees in advance of the upcoming New York Toy Fair), and (2) Kellytoy Worldwide’s stationary it uses to communicate directly to Squishmallows plush customers, a true and correct copy of which is attached hereto as **Exhibit 9.**

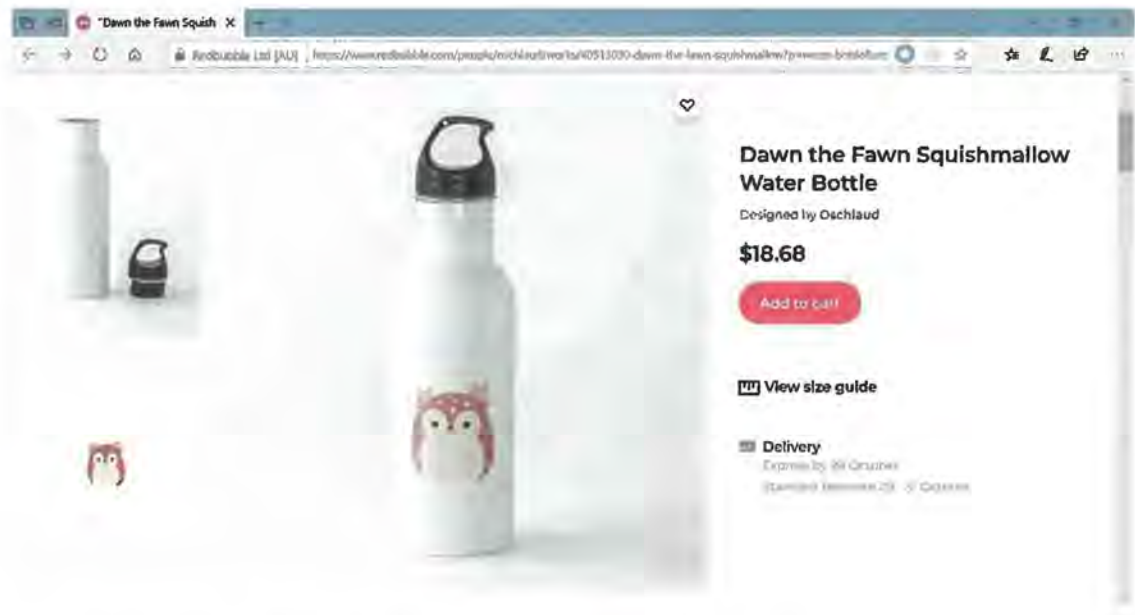
22. As a direct result of these and other efforts at promoting and building its recognition in the marketplace, Kellytoy’s Squishmallows line has exploded in popularity, creating substantial demand for and interest in Squishmallows, and generating enormous goodwill in the Squishmallows brand and designs in the United States and around the world. In fact, Kellytoy’s Squishmallows are sold through hundreds of retailers including some of the largest retailers in the country, including, approximately 1000 Costco stores, 5,500 Walmart stores, 8,500 Walgreens stores, 6200 CVS stores, 4,000 Kroger supermarkets and Fred Meyer stores, 1,800 Target stores, 700 Justice stores, 900 Party City stores, amongst other outfits such as Dave & Busters, Knotts Berry Farms and numerous others.

23. Since the summer of 2017, Kellytoy has shipped approximately a 40 million (40,000,000) units of traditionally shaped Squishmallows and, based on the product trajectory, there is no indication that sales will be slowing down anytime soon. Kellytoy’s Squishmallows products embodying the Squishmallows Trade Dress have yielded tens of millions of dollars of sales in the U.S. over the past year.

24. In fact, Kellytoy Worldwide's Squishmallows sold out through Walgreens.com during their Gift of the Week promotion in early November 2017, as well as exceeding all sales goals for the campaign, both online and in stores.

25. Kellytoy's Squishmallows have become so popular among, sought after by, and recognizable as a brand by the public that some members of the public have been selling unauthorized merchandise, such as T-shirts, flasks, and jewelry, bearing the images of some of Kellytoy Worldwide's most popular Squishmallows branded toys. But while Kellytoy has since put a stop to these unauthorized uses, it has preserved exemplars of some such infringements by numerous different infringers, as depicted below:





26. Because of the immense popularity of Kellytoy Worldwide’s Squishmallows line of plush toys, Kellytoy Worldwide has recently embarked on a global initiative with Evolution USA to license the Squishmallows designs and trademark to include diverse categories of merchandise, including apparel, sleepwear, accessories, headwear, home decor, health and beauty, back to school, stationery and paper goods, games and puzzles, novelty, publishing and magazines, food and beverage, and mobile gaming. (Attached as **Exhibit 10** hereto is a true and correct copy of an article published by ToyBook.com announcing the launch of Kellytoy Worldwide’s global licensing program with Evolution USA.)

27. Because of Kellytoy Worldwide’s efforts to distinguish its Squishmallows line and the resulting massive success and popularity of that line, consumers have come to associate Kellytoy Worldwide’s high-quality Squishmallows plush toys with Kellytoy Worldwide or at least a single source. I know this from my discussions with customers, the wide press coverage and awards relating to Squishmallows, and by reviewing hundreds of social media posts (on Instagram, Facebook, etc.) from end consumers. Kellytoy Worldwide has had many successful product offerings over the years, but come close to

Squishmallows in terms of market penetration, press coverage, social media buzz, and customer recognition. Squishmallows have outperformed any other product and all of these categories by double-digit orders of magnitude.

28. Also from my discussions with customers, my review of numerous press mentions, and my review of numerous social media posts from end consumers, it is evident that Kellytoy Worldwide's Squishmallows are instantly recognizable by the combination of their egg/bell-like shape, absence of proportionate/pronounced limbs, simplified Kawaii-inspired aesthetics, short pile silky shell, and airy, silky stuffing – features common among all of Kellytoy Worldwide's traditional Squishmallows.

29. I am informed and believe that Kellytoy Worldwide's Squishmallows branded plush toys owe their popularity, in part, due to the high quality of these goods and the rigorous quality control procedures that they undergo.

30. In order to protect the goodwill Kellytoy Worldwide has accumulated in its Squishmallows trade dress, Kellytoy Worldwide has often had to enforce its rights vis-à-vis third parties who have, in Kellytoy Worldwide's view, infringed upon those rights. In certain instances, Kellytoy Worldwide managed to resolve such disputes to its satisfaction short of litigation. In other instances, Kellytoy Worldwide filed complaints against such third parties. In those cases no longer pending, Kellytoy Worldwide entered into confidential settlement agreements with the defendants on terms consistent with Kellytoy Worldwide's goal of protecting its rights in its Squishmallows trade dress. In fact, besides this litigation, Kellytoy Worldwide has two other litigations pending concerning the infringement of Kellytoy Worldwide's Squishmallows Trade Dress.

31. As part of my duties as Kellytoy Worldwide's Senior Vice President of Sales and Product Development, I routinely visit retail stores throughout the country. During those visits, I have observed Ty branded plush toys being sold in many of the same large retailers through which Kellytoy Worldwide's goods are sold, such as Walgreens, Fred Meyer, Kroger, and CVS, among others.

32. I am also informed and believe that Ty has been offering to sell its “Squish-a-Boos” plush line to customers at prices that are significantly lower than the prices charged by Kellytoy Worldwide for its authentic Squishmallows branded plush. Such sales tactics will significantly harm Kellytoy Worldwide’s ability to make a profit on its authentic Squishmallows line of plush toys, as Kellytoy Worldwide will have no choice but to try to match Ty’s pricing in order to compete in the marketplace. With Ty’s significant distribution network in the marketplace, this will cause great harm to Kellytoy Worldwide’s market share and profitability for its authentic Squishmallows plush toys.

33. It is clear, based on my experience in the industry and at Kellytoy Worldwide, that Ty’s conduct threatens to significantly undercut Kellytoy Worldwide’s pricing for Kellytoy Worldwide’s authentic Squishmallows. That is because Ty has waited on the sidelines for two and half years to launch its highly similar “Squish-a-Boos” plush line, after Kellytoy Worldwide had established extensive goodwill in the Squishmallows trade dress. In other words, now that Kellytoy Worldwide has invested so significantly in the development, advertising, and promotion of its Squishmallows line of toys, Ty can ride Kellytoy Worldwide’s proverbial coattails without having to undertake those same investments.

34. The next big industry tradeshow in the United States is Toy Fair New York, scheduled to take place on February 22-25, 2020 – considered the most important and most attended tradeshow in the United States. I am informed and believe that Ty plans to show its “Squish-a-Boos” plush line at the upcoming Toy Fair New York.

35. As part of Kellytoy Worldwide’s campaign to highlight to customers that the overall “look and feel” of its Squishmallows is meant to distinguish them from the plush toys of others and to indicate a single source, renderings of various Squishmallows designs appear on the hangtags for the Squishmallows plush toys. A true and correct photograph of a hangtag typically affixed to Kellytoy Worldwide’s authentic Squishmallows are attached collectively hereto as **Exhibit 11**.

36. Similarly, even though the product displays naturally contain actual specimens of Squishmallows plush goods, Kellytoy Worldwide also includes graphic depictions of various Squishmallows designs on the displays. Kellytoy Worldwide does this to emphasize and educate the customers that the overall “look and feel” of the Squishmallows line is intended to communicate a single source. True and correct photographs of product displays for the Squishmallows line of toys, in various sizes, are attached hereto collectively as **Exhibit 12**.

37. If standing upright provided a utilitarian advantage, Kellytoy would have designed Squishmallows to stand up more stably, e.g., as squares, rectangles, triangles, spheres, cylindrical, oblong/lateral pillows, etc. or with a much wider base relative to the upper portion.

38. Squishmallows generally retail, depending on the size, from \$2.99 to \$19.99.

39. As part of my duties, I also participate in overseeing the production of Kellytoy Worldwide’s Squishmallows plush line. In that capacity, I have regular exposure to different materials and manufacturing processes used in connection with the production of plush toys, including the materials and manufacturing processes used in connection with the development of the Squishmallows line.

40. In addition, as part of my duties, I routinely visit retailers and trade shows nationwide to familiarize myself with the plush toy offerings of Kellytoy Worldwide’s competitors in the marketplace.

41. At no time has Kellytoy Worldwide filed for a utility patent for the Squishmallows plush as a whole or any element thereof.

42. None of Kellytoy Worldwide’s advertising touts the utilitarian advantages of the Squishmallows, other than the fact that the Squishmallows can be used as pillows – a characteristic of many, if not most, plush toys.

43. All of the elements of the Squishmallows plush design are aesthetic

in nature, none of them providing any particular function, other than to distinguish these plush toys from those of others. In fact, the shape, appearance, texture, and feel of the Squishmallows plush toys are all aesthetic features as to which there are innumerable alternatives and which, indeed, were specifically designed to distinguish the Squishmallows from other toys. For example, there are countless alternative plush toy shapes (e.g., traditional animal designs as opposed to Kellytoy's whimsical, abstract renditions of animals, cube shaped plush toys, rectangular shaped plush toys, spherical shaped plush toys, cylindrical shaped plush toys, etc.), such as:







44. Likewise, set forth above, there are numerous alternative means to depict body and facial features, e.g., traditional plush toy body and facial features often have prominent and proportionate limbs and facial features appear in three dimensions, such as protruding snouts, etc.

45. In addition, there are a myriad of alternative shell materials (e.g., terrycloth, long pile plush, velboa, satin, etc.), as depicted below:





46. Similarly, there are countless alternative stuffing materials available (e.g., beans, cotton, hard foam, etc.). Regardless, when the features of the Squishmallow plush toys are viewed collectively, it is clear that there are innumerable alternative plush designs actually used and available to competitors in the marketplace.

47. Also, there are also a myriad of alternative designs for plush toys in the marketplace which, while embodying some of the Squishmallow features, do not include all of them in a single plush toy. There are an infinite number of forms, features, and textures in which to design a plush toy – the vast majority of which do not infringe upon Kellytoy Worldwide’s Squishmallow trade dress.

48. The selection of the particular shape, materials, and design of Kellytoy Worldwide’s Squishmallows do not result from a comparatively simple or inexpensive method of manufacture vis-à-vis other plush toys. Although the Squishmallows plush are made with high-quality materials, the particular design has nothing to do with the quality – something determined by the quality of the materials chosen and the manufacturer’s machinery, skill and care with which the products are manufactured, in line with Kellytoy Worldwide’s quality control standards. The ultimate quality results from the material and

manufacturing choices made by the Kellytoy and is not related to the design aesthetic or the particular combination of features that give rise to the overall “look and feel” of Kellytoy Worldwide’s Squishmallows plush.

49. Moreover, protection of the Squishmallow trade dress as a trademark would not impose a non-reputation-related competitive disadvantage on Ty Inc. To the contrary, the Squishmallow trade dress – with its unitary aesthetic across its Squishmallows line – was specifically designed to distinguish the source of products embodying the Squishmallow trade dress from the source of other toys. As set forth above, there are numerous alternative designs available to Ty Inc. to compete in the marketplace without trading off of the goodwill garnered by Kellytoy Worldwide in its Squishmallows plush.

50. From correspondence received by Kellytoy Worldwide’s attorneys from Ty’s attorneys, we are informed that Ty will be using the Squish-a-Boos trademark in connection with the accused infringing goods. As close as Defendant’s designs are to Kellytoy Worldwide’s authentic Squishmallows designs, Kellytoy Worldwide would never release Squishmallows bearing Defendant’s specific designs: They simply do not comport with the aesthetic that Kellytoy Worldwide wishes to associate with its Squishmallows branded goods. Through my visual inspection of photographs of the Ty Squish-a-Boos, it is apparent that they possess a very soft, short pile outer shell similar to Kellytoy Worldwide’s Squishmallows line.

51. Due to my long-standing experience in the plush toy market and my efforts to monitor the activities of Kellytoy Worldwide’s competitors, including through my discussions with various colleagues, I am familiar with Ty Inc.’s launch of various plush toy lines including the ones discussed herein below.

52. Ty Inc. is one of the largest manufacturers of stuffed plush toys in the world. Its first major product success was Ty Beanie Babies.

53. As sales of Beanie Babies began to wane, Ty sought to add new product lines. Rather than innovate, however, Ty Inc. looked to its competitors for new product

ideas and, in many cases, undercut the pricing for the originals and used its well-established distribution network and significant capital to establish itself as the market leader for its knockoff products – essentially drowning out the originals in the marketplace.

54. To illustrate, I am setting forth a few nonexhaustive examples of Ty Inc.'s afore-described conduct.

Jellycat® Pom Poms

55. Some years ago, a plush toy manufacturer operating under the trademark Jellycat® released the below depicted ostrich design named Pom Poms:



56. Soon thereafter, Ty released an extremely close copy of Pom Poms under its Beanie Boo line, essentially the same basic design with larger eyes, set forth below:



Aurora® YooHoo Lemur

57. In or about January 2007, Aurora launched its YooHoo & Friends brand of plush toy characters, including the below depicted lemur:



58. At some point in 2009, after Aurora's YooHoo & Friends established the market for such goods, Ty released a line of plush animal toys called the Beanie Boos, which copied the overall "look and feel" of Aurora's YooHoo & Friends, exemplified by the below-depicted lemur:



Although Aurora was unsuccessful in obtaining a preliminary injunction against Ty Inc. in connection with Ty's Beanie Boos, that fact does not take away from the fact that this establishes a modus operandi for Ty Inc., i.e., wait for a competitor to establish a market for an innovative designer line and then undercut the price (e.g., Ty's Beanie Boos at approximately \$4.50 vs. Aurora's YooHoo's at approximately \$6.50) and flood the marketplace with goods that co-opt the overall look and feel of that line.

Disney's Tsum Tsum

59. A similar thing happened with Disney's Tsum Tsum line. A mere six months after Disney launched this line, Ty Inc. launched its TY Teeny Ty line copying the same overall look and feel and adapting it to its Beanie Boos designs.



Disney's Tsum Tsum



TY Teeny Ty

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I declare under penalty of perjury under the laws of the United States of America
that the foregoing is true and correct.

Executed this 18th day of February, 2020, at Vernon, California.



JEANNE YOON

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

KELLYTOY WORLDWIDE, INC. and
KELLYTOY (USA), INC.,

Plaintiffs,

vs.

TY INC. and DOES 1- 10,

Defendants.

Case No. 1:20-cv-00748

FIRST AMENDED COMPLAINT

Plaintiffs KELLYTOY WORLDWIDE, INC., a California corporation (“Kellytoy Worldwide”) and KELLYTOY (USA), INC., a California corporation (“Kellytoy USA”) (together, “Kellytoy”) bring this action against defendant TY INC. (“Ty”) and DOES 1 through 10 (collectively, “Defendants”) for injunctive relief and damages under the laws of the United States and the State of Illinois, as follows:

JURISDICTION AND VENUE

1. This action arises under the trademark laws of the United States, 15 U.S.C. §§ 1114 and 1125(a), under the statutory and common law of trademark/trade dress infringement and unfair competition.
2. This Court has jurisdiction under 28 U.S.C. §§ 1331, 1338, and 1367, and 15 U.S.C. §§ 1114, 1116, 1117, 1121, and 1125.
3. Venue lies in this judicial district pursuant to 28 U.S.C. § 1391 and 1400(a).
4. This Court has personal jurisdiction over Defendants, as Defendants are doing business in the State of Illinois and this District and are subject to the jurisdiction of this Court.

5. Ty has purposely and willfully directed its intentional misuse and infringement of the Kellytoy trademark and trade dress in the State of Illinois with the knowledge that the actions have caused damage within the State of Illinois.

6. By transacting business with customers in this District, and by using the goodwill and reputation built by Kellytoy, in this district, Ty has purposely availed itself of the privilege of conducting business in this judicial district and has established sufficient contacts with the State of Illinois such that it is subject to jurisdiction in Illinois.

7. To the extent Kellytoy's claims arise from Illinois statutory and/or common law, this Court has proper jurisdiction because it bears a logical relationship to the aggregate core of operative facts relating to Kellytoy's claims under the Lanham Act.

8. Defendant Ty is a corporation organized under the laws of the state of Delaware with its principal place of business in 250 Chestnut Avenue, Westmont, Illinois 60559.

NATURE OF THE ACTION

9. This action, as alleged below, arises specifically because defendant Ty has embarked on a transparent campaign to hijack Kellytoy USA and Kellytoy Worldwide's longstanding and well-earned goodwill in the plush toy marketplace by infringing on Kellytoy USA's registered trademark and Kellytoy Worldwide's distinctive trade dress. Ty, in its haste to sow customer confusion and consequently draw business from Kellytoy USA, has employed a name, PUFFIES, that is a virtual and linguistic replica of Kellytoy USA's registered PUFFY® trademark. Indeed, the Ty mark sounds the same, looks the same, means essentially the same thing, and is used for similar goods as Kellytoy USA uses in connection with its long established PUFFY® mark. That duplication is plainly deliberate – Ty is attempting to confuse customers into believing, falsely, that its goods are associated with and derive from the same source of origin as Kellytoy USA's products. Beyond all that, Ty is offering for sale its competing plush

toys (bearing the infringing PUFFIES mark) in the same tradeshow as Kellytoy USA's products, all but assuring the intended and expected customer confusion.

10. In addition, Kellytoy Worldwide's SQUISHMALLOW branded plush toys ("Squishmallows") – representative samples of which are depicted in **Exhibit 1** hereto – are one of the world's hottest plush toy lines. Kellytoy Worldwide's Squishmallows feature a highly distinctive and widely recognized trade dress (described below), which Kellytoy Worldwide pioneered and created. Kellytoy Worldwide actively markets its Squishmallows through numerous media outlets, including, without limitation, on social media, at tradeshow, through Squishmallows.com, amazon.com, walmart.com, walgreens.com and target.com, and on Kellytoy Worldwide's website and social media accounts, depicting images of its proprietary Squishmallows line of plush toys.

11. The explosion in popularity of Kellytoy Worldwide's Squishmallows, and the resulting and widespread customer and industry recognition, has unfortunately led to illegal imitation by some of Kellytoy Worldwide's competitors. Defendants are merely the latest, though most brazen and capable, of the intellectual property pirates seeking to conscript Kellytoy Worldwide's goodwill for unfair competitive purposes. Indeed, Kellytoy Worldwide has discovered that defendant Ty has been making and offering for sale to customers nine (9) knock-off products under the moniker Squish-A-Boos that incorporate Kellytoy Worldwide's Original Squishmallows Trade Dress (defined below) for distribution to customers throughout the United States and within this state and district that infringe upon Kellytoy Worldwide's Original Squishmallows Trade Dress.

12. Accordingly, Kellytoy has no alternative but to take steps to preserve and protect its intellectual property from this naked attack, and it thus has filed this action for trademark infringement, trade dress infringement, unfair competition and false designation of origin under

the Lanham Act, 15 U.S.C. § 1125(a), Illinois unfair competition laws, Illinois Deceptive Trade Practices Law pursuant to 815 ILCS §§ 510/1, *et seq.* and the common law trade dress infringement.

THE PARTIES

13. Kellytoy (USA), Inc. is a California corporation with its principal place of business located in Los Angeles, California.

14. Kellytoy Worldwide, Inc. is a California corporation with its principal place of business located in Los Angeles, California. (Kellytoy USA and Kellytoy Worldwide will sometimes be referred to collectively herein as “Kellytoy.”)

15. Kellytoy is in the business of developing, manufacturing and selling children’s toys including, among other things, plush toys.

16. Defendant Ty Inc. (“Ty”) is a Delaware corporation with its principal place of business in 250 Chestnut Avenue, Westmont, Illinois 60559.

17. Ty is in the business of manufacturing and selling children’s toys, including plush toys.

18. The true names and capacities of defendants sued herein as DOES 1-10, inclusive, are unknown to Kellytoy, who therefore sues said defendants by such fictitious names. Kellytoy will amend this Complaint to allege their true names and capacities when the same are ascertained.

19. Upon information and belief, at all relevant times mentioned in this Complaint, Defendants, and each of them, were acting in concert and active participation with each other in committing the wrongful acts alleged herein, and were the agents of each other and were acting within the scope and authority of that agency and with the knowledge, consent and permission of one another.

BACKGROUND FACTS

Kellytoy and Its Protected Intellectual Property Rights

20. Kellytoy USA and Kellytoy Worldwide are innovative and highly successful creators, manufacturers, distributors and sellers of unique plush toys.

21. Kellytoy USA has been in business for approximately three decades and in that time has developed a reputation for producing high quality, unique, and creative plush toys that are highly prized in the industry and in widespread demand by the consuming public. Similarly, Kellytoy Worldwide has been in business for nearly two decades and developed its own reputation for producing high quality, unique, and creative plush toys, including, most recently, its highly successful Squishmallows line of plush toys in connection with the SQUISHMALLOW® and SQUISHMALLOWS brands. (*See, e.g., Exhibit 1.*)

22. Kellytoy devotes extensive time and resources promoting and preserving its image and identity and the image and identity of its high-quality plush toys. That includes, without limitation, creating distinctive designs and marks for use on its products, seeking U.S. trademark and copyright registrations for such marks and designs, and taking all steps necessary to preserve and protect its intellectual property.

Kellytoy USA's PUFFY® TRADEMARK

23. In particular, Kellytoy USA is the sole and exclusive owner of United States Federal Trademark Registration No. 4517007 for the trademark PUFFY (the "PUFFY Mark") for "plush toys, not intended for pets." A true and correct copy of United States Certificate of Registration No. 4517007 for the PUFFY Mark is attached as **Exhibit 2**.

24. Kellytoy USA has been and is the sole owner of all right, title and interest in and to the PUFFY Mark and the United States trademark registration therefor (occasionally referred to as the "Mark").

25. Kellytoy USA has made widespread and prominent use of the PUFFY Mark in connection with the marketing and sale of its goods under that trademark since at least as early as 2009, such that, in addition to being inherently distinctive, the mark has also acquired distinctiveness in the minds of consumers as designating a single source, Kellytoy USA. As a result of such promotion and sales, coupled with the reputation of the high quality of Kellytoy USA's goods sold in connection with the PUFFY Mark, the PUFFY Mark has attained goodwill among consumers nationally.

Kellytoy Worldwide's SQUISHMALLOW® TRADEMARK

26. Kellytoy Worldwide is the sole and exclusive owner of United States Federal Trademark Registration No. 5454574 for the trademark SQUISHMALLOW, often also designated as SQUISHMALLOWS, (the "SQUISHMALLOW Mark") for "plush toys." A true and correct copy of United States Certificate of Registration No. 5454574 for the SQUISHMALLOW Mark is attached as **Exhibit 3**.

27. Kellytoy Worldwide has made widespread and prominent use of the SQUISHMALLOW Mark in connection with the marketing and sale of its goods under that trademark since at least as early as 2017, such that, in addition to being inherently distinctive, the mark has also acquired distinctiveness in the minds of consumers as designating a single source, Kellytoy Worldwide. As a result of such promotion and sales, coupled with the reputation of the high quality of Kellytoy Worldwide's goods sold in connection with the SQUISHMALLOW Mark, the SQUISHMALLOW Mark has attained goodwill among consumers nationally.

Kellytoy Worldwide's Squishmallows Trade Dress

28. In 2016, Kellytoy conceived of and began creating its original Squishmallows line of plush toy designs that shares common, unique features distinguishing them from the goods of others (the "Original Squishmallows line"), representative examples of which are depicted on

Exhibit 1 hereto. Most of these designs are the subject of United States Copyright Registrations or pending applications therefor, and each is sold in commerce under the Squishmallows brand. In essence, Kellytoy created a distinctive line of plush toys that has spawned a cultural craze in which numerous imitators have emerged, not the least of which are Defendants.

29. Since that time, in addition to its Original Squishmallows line, Kellytoy has introduced various other lines of Squishmallows branded plush toys, such as its Squishmallows Stackables line, its Squishmallows Hugmees line, among others. In this action, Kellytoy only asserts its trade dress rights garnered in its Original Squishmallows line of plush toys, as more fully described herein below, which has comprised approximately 95% of the total Squishmallows branded plush toys sold by Kellytoy Worldwide to date.

30. In that regard, however, Kellytoy Worldwide has been and is the sole owner of all right, title and interest in and to the Original Squishmallows line that possesses unique, recognizable and distinguishing features that are common across much of the Original Squishmallows line. From 2016 to the present, Kellytoy Worldwide has expended large sums of money in developing, advertising and promoting the Original Squishmallows Trade Dress (defined below), and the product designs bearing it, through the United States. In fact, Kellytoy Worldwide has an annual marketing budget of approximately \$1,000,000 and is spending approximately \$500,000 annually in direct to consumer and business-to-business advertising in connection with its Squishmallows branded goods.

31. Due to Kellytoy Worldwide's distinctive trade dress, coupled with its unique designs, extensive marketing efforts, media coverage, and market penetration, the Original Squishmallows Trade Dress has acquired distinctiveness in the marketplace when applied to plush toys. In fact, because of Kellytoy Worldwide's extensive promotional activities and widespread display of plush toys bearing the Original Squishmallows Trade Dress directed to the

public, and a consequence of Kellytoy Worldwide's well-earned reputation for fairness and integrity in dealings with its customers, the relevant consuming public has come to recognize and associate plush toys bearing embodying the trade dress as high quality goods connected with or offered by Kellytoy Worldwide. As a result, that trade dress has valuable goodwill and consumer recognition associated with it and has come to symbolize the exemplary reputation of Kellytoy Worldwide.

32. Consistent with that advertising and marketing scope, Kellytoy Worldwide sells a broad range of Squishmallows branded plush toys in its Original Squishmallows line featuring the brand's iconic trade dress, and whose overall look, feel and image – and in particular but without limitation its distinctive combination of shapes, colors, textures and graphics – serve as a distinctive source identifier to the consuming public. Though not easily reduced to writing, these features include: (1) substantially egg/bell shaped plush toys depicting various similarly shaped fanciful renditions of animals/characters; (2) simplified Asian style Kawaii faces with repeating and complementary rounded/oval shaped graphics depicting features on the characters themselves (such as eyes, snouts and bellies) and which conform to and support the overall egg/bell shape of the toys; (3) embroidered facial features, such nostrils, and/or mouths; (4) distinctive contrasting and non-monochrome coloring; and (5) short-pile velvety velour-like textured exterior with a light and silky memory foam-like stuffing providing an extremely soft and squeezable marshmallow feel. These features, and the resulting overall look and feel of the toys bearing them, are more fully depicted, without limitation, in **Exhibit 1** hereto (collectively, together with **Exhibit 1**, the “Original Squishmallows Trade Dress”).

33. Kellytoy Worldwide has, beginning in 2016 and continuing without interruption, expended a great deal of time, effort, and money in the promotion of its Original Squishmallows line. And due to Kellytoy Worldwide's distinctive designs, robust marketing efforts, media

coverage, and market penetration, the Original Squishmallows Trade Dress has acquired distinctiveness in the marketplace when applied to plush toys. As a further result of Kellytoy Worldwide's extensive promotional activities and widespread display of its Original Squishmallows line directed to the public and as a result of the fairness and integrity mentioned above, the relevant consuming public has come to recognize and associate plush toys bearing the Original Squishmallows Trade Dress as high quality goods connected with or offered by a single source, Kellytoy Worldwide. The Original Squishmallows Trade Dress thus embodies valuable goodwill and consumer recognition associated with it and has come to symbolize the valuable goodwill and reputation of Kellytoy Worldwide.

34. Beyond merely being original and inherently distinctive, the Original Squishmallows Trade Dress is also widely recognized by consumers. A simple Internet search using the Google search engine yields, for example, about 1,370,000 "hits" for the search term "Squishmallows."

35. The scope of Kellytoy Worldwide's sales reflects the market penetration of its intellectual property. The company markets and sells its Squishmallows branded plush not only through thousands of retail stores nationwide, but additionally on its website <squishmallows.com> featuring dozens of copyright-protected photographs of its plush toys and models holding its Squishmallows. Copies of selected pages from website located at <squishmallows.com> are attached as **Exhibit 4**, which specifically call out the fact that the Squishmallows are the "Original" and that the "shape, look, feel, and texture of the Squishmallows branded plush toys constitute Kellytoy Worldwide's proprietary trade dress." Kellytoy Worldwide's Squishmallow website traffic has, not surprisingly, grown exponentially since its launch in 2017, and has now reached an average in excess of 5,500 visits per day.

36. Kellytoy Worldwide also actively engages in promoting its Original Squishmallows line of branded plush toys through its numerous social media accounts, including on Instagram, Facebook, and Twitter. Indeed, Kellytoy Worldwide's legion of loyal fans of its line of Original Squishmallows line of branded plush toys have been extremely engaged on social media, including Facebook and Instagram, demonstrating their awareness and affection for Kellytoy Worldwide's Original Squishmallows line. For example, the average Squishmallows post likes on Instagram, for example, hovering over 2000+ per post and 45-100 average comments per post. In fact, Kellytoy Worldwide's Squishmallows branded plush toys have garnered over 200 Million media impressions and since July 21, 2017, Kellytoy Worldwide's paid placements on Facebook and Instagram campaigns have reached more than 23.6 MILLION unique individuals and 83.7 MILLION impressions.

37. Kellytoy Worldwide uses digital ads to advertise its Original Squishmallows line of plush toys. Owing to their immense popularity, these ads promoting specific retailers have average click through rates of 30+% (the industry average is rates of 30+% (the industry average is 1-2%).

38. Further adding to their recognition and secondary meaning in the marketplace, Squishmallows have been featured in over 300 publications, including magazines, press articles, reviews, and videos, as set forth in greater detail in **Exhibit 5** hereto, including many mainstream media publications such as the *Washington Post*, the *Chicago Tribune*, the *Daily Harold*, *Okay! Magazine*, among others. By way of example only, the Original Squishmallows line has been also recognized by: (1) The *Washington Post* and *Consumer Reports* on their 2017 Holiday Gift Guides; (2) *LA Parent* in its October 2017 issue, under the "Products We Love" section, which specifically identified designs from the Original Squishmallows line; and (3) *OK! Magazine* in its August 21, 2017 issue, which, as depicted below, featured Squishmallows and described them

in flattering terms, stating “Cuddly as they are cute, they make great couch pals, pillows and bedtime buddies in any home. Collect the whole squad! squishmallows.com.”

39. There are myriad further examples of the popularity and market penetration of the Original Squishmallows line. To name just a few, designs from the Original Squishmallows line were featured in the October 2017 issues of *L.A. Parent Magazine*, *City Parent Magazine*, and *San Diego Family Magazine* and included in the 2017 gift guides for various publications, including in *The Washington Post*, *The Houston Chronicle*, and *L.A. Parent*.

40. In fact, Kellytoy Worldwide’s Original Squishmallows line sold out through Walgreens.com during their Gift of the Week promotion in early November 2017, as well as exceeding all sales goals for the campaign, both online and in stores.



41. Reflecting the quality of the goods, Kellytoy Worldwide’s Original Squishmallows line has also received numerous industry awards and product recommendation lists, including by the National Parenting Product Awards, Parents’ Choice, and TTPM, as more

fully set out in **Exhibit 5**. Thus, for example, Kellytoy Worldwide's Original Squishmallows line was named by *Toy Insider* as one of the "Top Holiday Toys," made the cover the September/October 2017 *Toy Book Magazine*, and have been featured in numerous other trade magazines, such as, *Teddy Bear and Friends Magazine* and *Animal Tales Magazine*.

42. The popular blog *Trendy Mom Reviews* listed Kellytoy Worldwide's Original Squishmallows line as one of "The Best Gifts for 2018!" Similarly, the popular blog *Two Kids And A Coupon* did its own review of Kellytoy Worldwide's Original Squishmallows line of branded plush, saying, among other things, that they are "a gift for anyone on our list this holiday!"

43. The Original Squishmallows line of branded toys were also: (1) named one of "The Best New Toys" by Minnesota Parent Magazine! and was named a Great Holiday Gifts For Littles by Texas Lifestyle Magazine!; (2) selected as among the "5 Editor's Picks From Toy Fair" 2019 by *Gifts & Decorative Accessories*; (3) featured by *The Toy Insider* in connection with its March 13, 2019 article entitled "Tips for Tackling Testing & Student Stress"; (4) featured on the cover of *The Toy Book's* "Plush Issue" and its Toy Fair New York 2019 issue, in *The Toy Book's* August 5, 2019 issue (specifically featuring the upcoming Halloween Squishmallows line), and in *The Toy Book's* issue (specifically featuring the Squishmallows branded turtle) on May 15, 2019; (5) featured in *TFE Toys & Family Entertainment's* NYC Toy Fair 2019 issue; and (6) won the *Parent and Teacher Choice Award* for 2019 from HowtoLearn.com.

44. Kellytoy Worldwide's Original Squishmallows line has become so popular that a selection of designs were included in the celebrity gift bags distributed to the celebrity attendees in connection with the 2019 Teen Choice Awards, including Jenn Ortega, Lucy Hale, Lil Nas X, Sarah Hyland, One Republic, among numerous others.

45. This widespread publicity and recognition has occurred in conjunction with Kellytoy Worldwide's advertising efforts concerning the Original Squishmallows line, which, as alleged above, have comprised consistent and robust marketing campaigns, including email campaigns, social media posts, and direct to consumer advertising. Kellytoy Worldwide's Squishmallows currently have over 128,000 Instagram followers, over than 85,000 Facebook followers, and more than 28,000,000 views on the popular TikTok video app – more than many longer-existing and well-known plush brands. To its followers, Kellytoy Worldwide regularly publishes photographs of its Squishmallows plush toys. Many of these followers, in turn, share these posts with their friends and social media followers. A copy of Squishmallows Instagram page, bearing photographs of Squishmallows plush toys, is attached as **Exhibit 6**, which specifically calls out the fact that the “shape, look, feel, and texture of the Squishmallows branded plush toys constitute Kellytoy Worldwide, Inc.’s proprietary trade dress.”

46. In addition, hundreds of well-known YouTube influencers and vloggers have shared and posted images and videos of themselves holding plush toys in Kellytoy Worldwide's Original Squishmallows line of products. Tens of thousands of consumers have done the same through numerous media platforms, including, Facebook, Instagram, Twitter, TikTok, Pinterest and YouTube. These posts have generated millions of “likes” and “shares” and all feature, among other things, depictions of Kellytoy Worldwide's Original Squishmallows line of plush toys. In fact, several members of the public have created their own Instagram fan accounts and Facebook groups, all bearing content featuring the Original Squishmallows line of branded plush toys.

47. Kellytoy Worldwide's Squishmallows are listed amongst the leading global brands and toys such as Hatchimals, Hasbro, RB, Hot Wheels, NERF, and Spin Master by several industry publications.

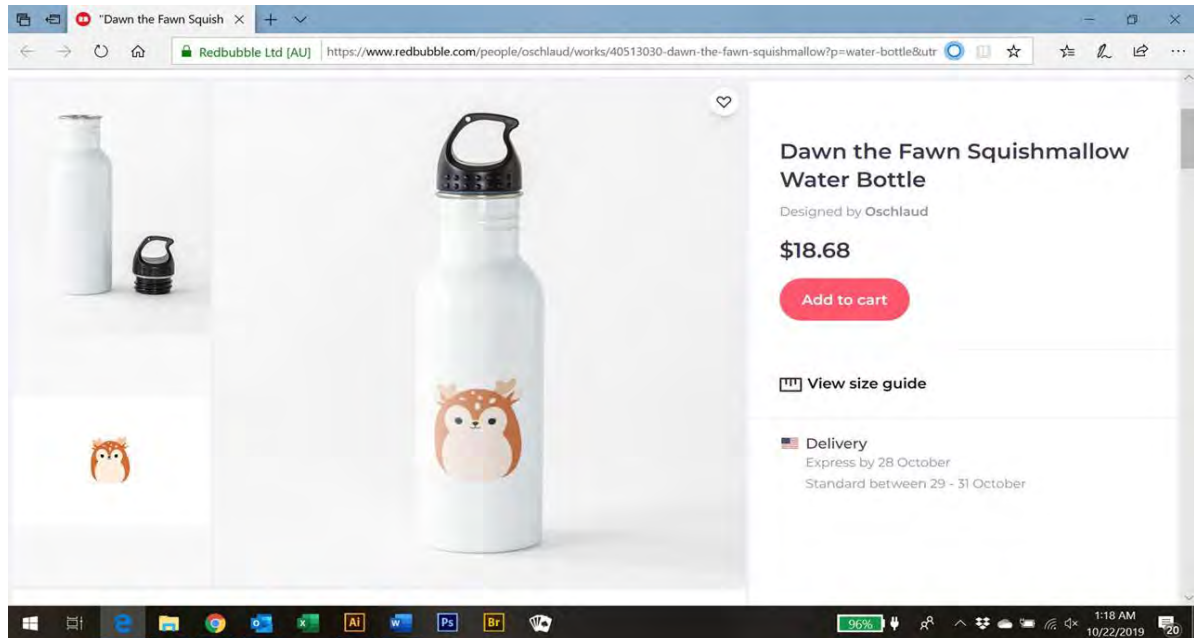
48. As a direct result of Kellytoy Worldwide's efforts at promoting and building its brand, Kellytoy Worldwide's Original Squishmallows line has exploded in popularity, creating substantial demand for and interest in Squishmallows, and generating enormous goodwill in the Original Squishmallows Trade Dress in the United States and around the world. In fact, Kellytoy Worldwide's Original Squishmallows line is sold through hundreds of retailers including some of the largest retailers in the country, including, approximately 1,000 Costco stores, 5,500 Wal-Mart stores, 8,500 Walgreens stores, 6,200 CVS stores, 4,000 Kroger supermarkets and Fred Meyer stores, 1,800 Target stores, 700 Justice stores, 900 Party City stores, amongst other outfits such as Dave & Busters, Justice, Hallmark stores, Albertson's, Knotts Berry Farms and numerous others.

49. Furthermore, during several summer 2019 grand openings for Costco, the highly coveted 24 inch Original Squishmallows plush sold out within two days, exceeding store expectations and projected demand.

50. Since the summer of 2017, Kellytoy Worldwide has shipped approximately a whopping 45 million (45,000,000) units of its Original Squishmallows line and there is no indication that sales will be slowing down anytime soon. Kellytoy's Squishmallows products embodying the Trade Dress have yielded tens of millions of dollars of sales in the U.S. over the past year.

51. Nor has the pace of sales of Kellytoy Worldwide's Original Squishmallows line of branded toys slowed. To the contrary, sales of the Original Squishmallows line of plush have been steadily increasing and there is no indication of their popularity waning any time soon. These goods have, in fact, become so popular among, sought after by, and recognizable as a brand by the public that some members of the public have been selling unauthorized merchandise, such as T-shirts and jewelry, bearing the images of some of Kellytoy Worldwide's

most popular Original Squishmallows branded toys. Few plush lines can boast having third parties attempt to “merchandise” its copyrighted designs and goods generally bearing its trademark – something typically reserved for Disney, Looney Tunes, and the like. But while Kellytoy has since put a stop to these unauthorized uses, it has preserved exemplars of some such infringements by three different infringers, as depicted below:





52. The immense popularity – indeed ubiquity – of Kellytoy Worldwide’s Original Squishmallows line of plush toys, including those set forth on **Exhibit 1**, has now reached the point where Kellytoy Worldwide has recently embarked on a global initiative to license the Original Squishmallows designs and trademark to include diverse categories of merchandise, including apparel, sleepwear, accessories, headwear, home decor, health and beauty, back to school, stationery and paper goods, games and puzzles, novelty, publishing and magazines, food and beverage, and mobile gaming. (*See, e.g., Exhibit 7* hereto.)

53. As a result of the extensive efforts to promote, advertise and sell the products embodying the Original Squishmallows Trade Dress and its deliberate efforts to specifically publicize the fact that the Squishmallows are the “Original” and that the “shape, look, feel, and texture of the Squishmallows branded plush toys constitute Kellytoy Wordlwide, Inc.’s proprietary trade dress,” consumers have come to associate the Original Squishmallows Trade Dress with a designation of source and the products are inherently distinctive and/or have acquired secondary meaning.

54. All of which is to reiterate that due to the Original Squishmallows line’s massive success and popularity, consumers have come to associate Kellytoy Worldwide’s high-quality

Original Squishmallows line of plush toys with the Original Squishmallows Trade Dress and, conversely, have come to recognize the Original Squishmallows Trade Dress as a designation of source. But that success has come at a price – the popularity of Kellytoy’s Original Squishmallows line of branded goods has attracted many imitators, such as Defendants, all of whom are attempting to benefit from Kellytoy Worldwide’s hard earned goodwill, and to do so illegally. In fact, Kellytoy has pursued numerous third-party infringers who have co-opted the Original Squishmallows Trade Dress and succeeded in stemming such infringements. Defendants, however, are uniquely positioned in the marketplace – through their massive marketing and distribution network – to capitalize upon Kellytoy Worldwide’s Original Trade Dress, as discussed in greater detail below.

Defendants’ Unlawful Conduct

55. At the outset, none of the defendants to this action is licensed or otherwise authorized by Kellytoy to market or distribute products bearing or embodying Kellytoy USA’s PUFFY Mark or Kellytoy Worldwide’s Original Squishmallows Trade Dress. Ty is a direct competitor of Kellytoy in the plush toy market.

56. Ty has made a career out of copying the original designs of others and using its large market share to usurp the goodwill of its competitors. Ty is a serial copier of the original designs of others.

57. Most recently, during the week of the Atlanta International Gift & Home Furnishings Market tradeshow (the “Atlanta Gift Show”), Kellytoy USA learned that, in spite of Kellytoy USA’s prior use and registration of the PUFFY Mark, Ty had a pending United States trademark application, based on intent to use, for the trademark TY PUFFIES. During that same show, Kellytoy Worldwide learned that Ty was offering for sale at that same tradeshow goods that embody the Original Squishmallows Trade Dress.

58. Consequently, by letter dated January 15, 2020, Kellytoy wrote directly to defendant Ty demanding that it cease-and-desist from using Kellytoy USA's PUFFIES trademark and copying Kellytoy Worldwide's Original Squishmallows Trade Dress. Ty responded by denying its wrongful conduct and essentially stating its intention to continue to infringe Kellytoy's proprietary rights by continuing to offer the Infringing Plush (defined below) for sale, including at the upcoming New York Toy Fair – the biggest toy tradeshow in the country, if not the world.

59. Kellytoy is informed and believes that sometime in 2019, and notably well after Kellytoy USA established its reputation in its PUFFY Mark and Kellytoy Worldwide established its reputation in its Original Squishmallows Trade Dress – and after the Mark and Trade Dress acquired distinctiveness in the marketplace – Defendant Ty began offering for sale various plush toy lines bearing a trademark and trade dress that are substantially and confusingly similar to Kellytoy USA's PUFFY Mark and to Kellytoy Worldwide's Original Squishmallows Trade Dress.

60. Specifically, Kellytoy USA is informed and believes that, at the Atlanta International Gift & Home Furnishings Market tradeshow (the "Atlanta Gift Show"), Ty used the PUFFIES trademark in connection with its plush toys (hereinafter collectively referred to as the "Infringing Puffies") that bears close similarity, in sight, sound, and meaning with Kellytoy USA's PUFFY Mark and, as set forth below:



61. Making matters even worse, at the same tradeshow, Ty displayed and marketed plush toys under the moniker “Squish-a-Boos” bearing the Original Squishmallows Trade Dress (hereinafter collectively referred to as the “Infringing Squish Plush”) – plush toys that so closely resemble the unique “look and feel” of the Original Squishmallows Trade Tress that manifest customer confusion was plainly intended and is certain to occur. Photographs of the Infringing Squish Plush are collectively attached hereto as **Exhibit 8**.

62. Defendants’ Infringing Puffies and Infringing Squish Plush shall hereinafter be referred to collectively as the “Infringing Plush.”

63. Kellytoy is specifically informed and believes, for example, that Defendants manufactured in, and imported from, China the Infringing Plush into the United States for the purpose of having the Infringing Plush enter interstate commerce and/or to be transported or used in interstate commerce through the same channels of trade through which Kellytoy USA sells its

PUFFY branded plush and Kellytoy Worldwide sells its Original Squishmallows line. Indeed, both Kellytoy and Ty sell plush toys to many of the same retailers, such as Claire's, Hallmark Stores, Five Below, Learning Express, Party City, Walgreens, Fred Meyer, Kroger, and CVS.

64. In fact, Kellytoy Worldwide currently sells its authentic SQUISHMALLOWS branded plush to Claire's, Hallmark Stores, Five Below, Learning Express, Party City, Walgreens, Fred Meyer, Kroger, and CVS and expects that Ty will make attempts to sell to its copies of Kellytoy's Original Squishmallows at prices lower than Kellytoy Worldwide sells its authentic Original Squishmallows.

65. Such unauthorized activities are clearly intended to draw on the goodwill Kellytoy USA has garnered in its PUFFY Mark and that Kellytoy Worldwide has garnered in its Original Squishmallows Trade Dress, and to compete unfairly and illegally for Kellytoy's customers through trademark confusion, trade dress confusion, and predatory tactics.

66. Kellytoy is informed and believes, for example, that Ty has been offering to sell the Infringing Squishy Plush to customers at prices that are lower than the prices charged by Kellytoy Worldwide for its authentic Original Squishmallows line of branded plush. Kellytoy Worldwide is further informed and believes that Ty is able to undercut Kellytoy Worldwide's sales prices because, rather than investing in creating its own designs and identity, Ty has instead copied and infringed Kellytoy Worldwide's proprietary Original Squishmallows Trade Dress and otherwise because its Infringing Squishy Plush are of inferior quality as compared to Kellytoy Worldwide's Original Squishmallows branded plush.

67. Kellytoy is additionally informed and further believes that Defendants, without Kellytoy's consent or permission, advertise, promote, and display, and intend to sell and distribute, the Infringing Plush in United States commerce and that Defendants' Infringing Plush are marketed and will be sold in the same channels of trade as Kellytoy's authentic plush toys.

68. The Defendants' deliberate misconduct in copying, advertising, and, offering for sale and otherwise using the PUFFY Mark trademark and the Original Squishmallows Trade Dress in connection with the Infringing Plush – including by copying wholesale the shape and look of Kellytoy Worldwide's Original Squishmallows Trade Dress – constitute trademark infringement, trade dress infringement, and false designation of origin regarding sponsorship of those plush toys and falsely represent to the public that the Infringing Plush originate from a common source with Kellytoy's authentic PUFFY branded and Original Squishmallows plush toys, and/or that Defendants' Infringing Plush have been sponsored, approved or licensed by Kellytoy, or in some way affiliated or connected with Kellytoy.

69. These activities are likely to confuse, mislead, and deceive Defendants' customers, purchasers, and members of the public as to the origin of Defendants' toys bearing the PUFFIES trademark and the Original Squishmallows Trade Dress, or to cause such persons to believe that Defendants' Infringing Plush and/or Defendants have been sponsored, approved, authorized, or licensed by Kellytoy or in some way affiliated or connected with Kellytoy, all in violation of, among other laws, 15 U.S.C. §§ 1114 and 1125(a).

70. Kellytoy is informed and believes that the Defendants' activities were conducted willfully with full knowledge of the falsity of such designations of origin and false descriptions or representations, with the intent to trade on the enormous goodwill Kellytoy USA has earned in its PUFFY Mark and Kellytoy Worldwide has garnered in its Original Squishmallows Trade Dress, and with the intent to cause confusion, and to mislead and deceive the purchasing public into believing that the products Defendants offer for sale and sell are directly sponsored by, authorized, by, associated with, or originate from Kellytoy or, at the very least, from a common source as Kellytoy's PUFFY and Original Squishmallows lines of branded plush toys.

71. Defendants, by their unauthorized infringement, copying and use of Kellytoy's PUFFY Mark and Original Squishmallows Trade Dress, have engaged and will engage in acts of trademark infringement, unfair competition, unlawful appropriation, unjust enrichment, wrongful deception of the purchasing public, and unlawful trading on Kellytoy's good will and the public acceptance of Kellytoy's original works. Defendants' activities have damaged and will continue to damage the reputation, business and good will of Kellytoy nationally and in this judicial district.

72. Upon information and belief, unless enjoined by the Court, Defendants will continue and further escalate their infringing activities.

73. Kellytoy has no adequate remedy at law. Thus, these activities of Defendants have caused and, if not enjoined, will continue to cause irreparable, immediate and impending harm and damage to Kellytoy's business, and to the business, business reputation and good will of Kellytoy.

FIRST CAUSE OF ACTION

(Federal Trademark Infringement – 15 U.S.C. § 1114(1)-(2)) (All Defendants)

74. Kellytoy USA repeats, realleges and incorporates each of the allegations made above as if fully set forth herein.

75. Kellytoy USA owns and has a protectable interest in the registered PUFFY Mark.

76. As the owner of all rights, title and interest in and to the PUFFY Mark, Kellytoy USA has standing to maintain in action for trademark infringement under the Lanham Act, including 15 U.S.C. §1114.

77. Without Kellytoy USA's authorization or consent, and having knowledge of Kellytoy USA's prior rights in the PUFFY Mark, Defendants have designed, manufactured,

distributed, advertised, offered for sale and/or sold highly similar plush toys bearing the highly similar trademark, PUFFIES, to the consuming public in direct competition with Kellytoy USA, in or affecting interstate commerce.

78. Defendants have caused actual confusion, a likelihood of confusion, mistake and deception as to the source of origin, sponsorship, authorization, association, or affiliation of Defendants' goods, such that the public has been confused and there is a likelihood that the public will be confused into believing that the products Defendants promote, distribute, and sell are directly sponsored by, associated with, or originate from the same source as Kellytoy USA's plush toys sold in connection with the PUFFY Mark.

79. Defendants' use of the PUFFY Mark violates sections 32(1) and (2) of the Lanham Act, 15 U.S.C. § 1114(1)-(2), because it constitutes unauthorized, willful and/or deliberate use in commerce of reproductions, counterfeits, copies, and/or colorable imitations of Kellytoy USA's federally-registered mark in connection with the sale, offering for sale, distribution, and advertising of products and services in a manner likely to cause confusion, mistake, and deception.

80. On information and belief, Defendants' acts have been willful and deliberate.

81. As a direct and proximate result of Defendants' unlawful conduct, Defendants have misappropriated Kellytoy USA's rights in the PUFFY Mark, as well as the goodwill associated therewith, and have diverted sales and profits from Kellytoy USA to Defendants. Thus, as a direct and proximate result of Defendants' acts of willful infringement, Kellytoy USA has suffered damage to its valuable brand and reputation, and other damages in an amount to be proven at trial, including Defendants' profits and Kellytoy USA's lost profits.

82. Defendants' actions described above have caused and will continue to cause irreparable damage to Kellytoy USA, unless Defendants are restrained by this Court. Kellytoy

USA has no adequate remedy at law with regard to Defendants' infringing conduct.

Accordingly, Kellytoy USA is entitled to a preliminary and permanent injunction, pursuant to 15 U.S.C. § 1116, restraining and enjoining Defendants' and their agents, servants, and employees, and all persons acting thereunder, in concert with, or on their behalf, from using Kellytoy USA's PUFFY Mark, or any colorable imitation or variation thereof, including PUFFIES, in connection with the sale and/or marketing of any products.

83. Defendants' aforesaid acts are exceptional within the meaning of 15 U.S.C. § 1117.

SECOND CAUSE OF ACTION

(Trademark Infringement and False Designation of Origin and False Description -- 15 U.S.C. §1125) (All Defendants)

84. Kellytoy USA repeats, realleges and incorporates each and every allegation made above as if fully set forth herein.

85. Kellytoy USA owns and has a protectable interest in the registered PUFFY Mark. As the owner of all rights, title and interest in and to PUFFY Mark, Kellytoy USA has standing to maintain an action for false designation of origin and unfair competition under the Lanham Act, including 15 U.S.C. § 1125.

86. The PUFFY Mark is highly distinctive and has each become associated in the public mind with plush toy products of the highest quality and reputation finding their origin in a single source, Kellytoy USA.

87. Kellytoy USA owns all right, title and interest in and to the PUFFY Mark.

88. Without Kellytoy USA's authorization or consent, and having knowledge of Kellytoy USA's prior rights in the PUFFY Mark, Defendants have imported, distributed, advertised, offered for sale and sold, and/or will continue to import, distribute, advertise, offer

for sale, highly similar plush toys bearing the highly similar trademark, PUFFIES, to the consuming public in direct competition with Kellytoy USA, in or affecting interstate commerce.

89. Defendants' PUFFIES trademark is confusingly similar to the PUFFY Mark. Defendants' use of the PUFFY Mark has caused and, unless enjoined by this Court, will continue to cause a likelihood of confusion and deception of members of the public and, additionally, injury to Kellytoy USA's goodwill and reputation as symbolized by the PUFFY Mark.

90. Defendants' use and further threatened uses of the PUFFY Mark thus constitutes trademark infringement, false designation of origin, and/or unfair competition in violation of 15 U.S.C. § 1125(a).

91. As a direct and proximate result of Defendants' unlawful conduct, Defendants have misappropriated Kellytoy USA's rights in the PUFFY Mark, as well as the goodwill associated therewith, and have diverted sales and profits from Kellytoy USA to Defendants. Thus, as a direct and proximate result of Defendants' acts of willful infringement, Kellytoy USA has suffered and/or will suffer damage to its valuable brand and reputation, and other damages in an amount to be proven at trial, including Defendants' profits and Kellytoy USA's lost profits.

92. Defendants' actions described above will cause, have caused, and will continue to cause irreparable damage to Kellytoy USA, unless Defendants are restrained by this Court. Kellytoy USA has no adequate remedy at law with regard to Defendants' infringing conduct. Accordingly, Kellytoy USA is entitled to a preliminary and permanent injunction, pursuant to 15 U.S.C. § 1116, restraining and enjoining Defendants' and their agents, servants, and employees, and all persons acting thereunder, in concert with, or on their behalf, both from using the PUFFY Mark, or any colorable imitations or variations thereof, in connection with the sale and/or marketing of any products.

93. Defendants' aforesaid acts are exceptional within the meaning of 15 U.S.C. § 1117.

THIRD CAUSE OF ACTION

(Trademark Infringement, Trade Dress Infringement, False Designation of Origin and False Description -- 15 U.S.C. §1125) (All Defendants)

94. Kellytoy Worldwide repeats, realleges and incorporates each and every allegation made above as if fully set forth herein.

95. Kellytoy Worldwide owns and has a protectable interest in the Original Squishmallows Trade Dress.

96. As owner of all rights, title and interest in and to the Original Squishmallows Trade Dress, Kellytoy Worldwide has standing to maintain an action for trade dress infringement under the Lanham Act including, 15 U.S.C. § 1125.

97. The Original Squishmallows Trade Dress is non-functional and highly distinctive and has each become associated in the public mind with plush toy products of the highest quality and reputation finding their origin in a single source, Kellytoy Worldwide.

98. Original The Squishmallows Trade Dress has acquired secondary meaning based upon, at least in part to, the amount and manner of advertising of products embodying the Squishmallows Trade Dress, the volume of sales, as well as, the length and manner of use of the products.

99. The Original Squishmallows Trade Dress – comprised of a proprietary combination of aesthetic and stylized plush toy features, including the shape, color, color combinations, texture and graphics– is non-functional and highly distinctive, and has become associated in the minds of the consuming public with plush toy products of the highest quality and reputation finding their origin in a single source, Kellytoy Worldwide. Indeed, the Original Squishmallows Trade Dress

when viewed as a whole – comprised of a combination of aesthetic and stylized plush toy features, including the shape, color, color combinations, texture and graphics – presents a non-functional look and feel that is uniquely associated with Kellytoy’s Original Squishmallows line. The non-functional nature of these features are evidenced and clear, in part, by reference to the following: (1) the Original Squishmallows Trade Dress is not the subject of an expired or unexpired utility patent; (2) the unique combination of stylistic elements yielding no utilitarian advantage; (3) the innumerable alternative stylistic plush toy features available to and used competitors, including, (i) countless alternative plush toy shapes (e.g., traditional animal designs as opposed to Kellytoy Worldwide’s whimsical, abstract renditions of animals, and rectangular shaped plush toys, spherical shaped plush toys, cube shaped plush toys, realistic plush toy animals, etc.), (ii) numerous alternative means to depict facial features (e.g., plastic eyes, traditional plush toy facial features, etc.), (iii) myriad alternative shell materials (e.g., terrycloth, long pile plush, velboa, satin, etc.), and (iv) countless alternative stuffing materials available (e.g., beans, pvc pellets, cotton, hard foam, etc.); furthermore, when the features of the Original Squishmallows Trade Dress are viewed collectively – as the law provides in assessing trade dress – it is clear that there are innumerable alternative plush designs actually used and available to competitors in the marketplace; (4) Kellytoy Worldwide’s not touting or marketing utilitarian advantages of its Original Squishmallows Trade Dress, and (5) the Original Squishmallows Trade Dress not resulting from a comparatively simple or inexpensive method of manufacture vis-à-vis other plush toys, e.g., the egg/bell shape provides no manufacturing cost savings (other shapes such as squares, circles, triangles are equally, or less, expensive to manufacture) and there are numerous less expensive shell materials (e.g., Tricot, EF Velboa and Velboa), stuffings (e.g., regular polyester stuffing and 3D light weight stuffing), and ways to depict the facial features other than embroidery (e.g., printing and sublimation printing). In fact, Defendants sell numerous lines of plush toys that do not co-opt the Original Squishmallows

100. Trade Dress, such as its Beanie-Boos line of plush toys. Moreover, protection of the Original Squishmallows Trade Dress as a trademark would not impose a non-reputation-

related competitive disadvantage, as there are many ways to design an equally pleasing plush toy without copying the Original Squishmallows Trade Dress. Regardless, however, the product features of the Original Squishmallows Trade Dress do not serve an aesthetic function wholly independent of any source identifying function. To the contrary, the Original Squishmallows Trade Dress was specifically designed to distinguish – and has succeeded in distinguishing – the source of products embodying the Original Squishmallows Trade Dress from the source of other toys.

101. Without Kellytoy Worldwide’s authorization or consent, and having knowledge of Kellytoy Worldwide’s prior rights in the Original Squishmallows Trade Dress, Defendants have designed, manufactured, imported, distributed, advertised, offered for sale and/or sold and/or will continue to import, distribute, advertise, offer for sale, and sell replicas of the Original Squishmallows Trade Dress to the consuming public in direct competition with Kellytoy Worldwide, in or affecting interstate commerce.

102. The Infringing Squishy Plush designs are, each alone and together, confusingly similar to the Original Squishmallows Trade Dress. Defendants’ use of the Original Squishmallows Trade Dress has caused and, unless enjoined by this Court, will continue to cause a likelihood of confusion and deception of members of the public and, additionally, injury to Kellytoy’s goodwill and reputation as symbolized by the Original Squishmallows Trade Dress.

103. Defendants’ use and further threatened uses of the Original Squishmallows Trade Dress thus constitute trademark infringement, trade dress infringement, false designation of origin, and/or unfair competition in violation of 15 U.S.C. § 1125(a).

104. As further evidence of Ty’s intent to trade upon Kellytoy Worldwide’s goodwill in Kellytoy Worldwide’s Original Squishmallows Trade Dress, in order to ensure consumer confusion, Defendants adopted a mark – for use in connection with the Infringing Squishy Plush,

namely Squish-A-Boos – that includes the same “squish” prefix and that has same number of syllables and sound as the SQUISHMALLOW Mark.

105. As a direct and proximate result of Defendants’ unlawful conduct, Defendants have misappropriated Kellytoy Worldwide’s rights in the Original Squishmallows Trade Dress, as well as the goodwill associated therewith, and have diverted sales and profits from Kellytoy worldwide to Defendants. Thus, as a direct and proximate result of Defendants’ acts of willful infringement, Kellytoy Worldwide has suffered and/or will suffer damage to its valuable brand and reputation, and other damages in an amount to be proven at trial, including Defendants’ profits and Kellytoy Worldwide’s lost profits.

106. Defendants’ actions described above will cause, have caused, and will continue to cause irreparable damage to Kellytoy Worldwide, unless Defendants are restrained by this Court. Kellytoy Worldwide has no adequate remedy at law with regard to Defendants’ infringing conduct. Accordingly, Kellytoy Worldwide is entitled to a preliminary and permanent injunction, pursuant to 15 U.S.C. § 1116, restraining and enjoining Defendants’ and their agents, servants, and employees, and all persons acting thereunder, in concert with, or on their behalf, both from using Kellytoy Worldwide’s Original Squishmallows Trade Dress, or any colorable imitations or variations thereof, in connection with the sale and/or marketing of any products.

107. Defendants’ aforesaid acts are exceptional within the meaning of 15 U.S.C § 1117.

FOURTH CAUSE OF ACTION

(Common Law Trade Dress Infringement) (All Defendants)

108. Kellytoy Worldwide repeats, realleges and incorporates each and every allegation made above as if fully set forth herein.

109. This claim arises under the common law of this State relating to trade dress infringement. This Court has jurisdiction over the subject matter of this claim pursuant to the provisions of 28 U.S.C. § 1338(b), this being a claim of unfair competition joined with a substantial and related claim under the Trademark Laws of the United States, and under 28 U.S.C. § 1367.

110. Kellytoy Worldwide is the owner of all right, title, and interest in and to the Original Squishmallows Trade Dress used by Kellytoy Worldwide by virtue of its extensive manufacture and sale of products bearing such trademarks and trade dress as set forth in the preceding paragraphs of this Complaint. In particular, because of their enormous sales and publicity, Kellytoy Worldwide has acquired common law trade dress rights in and to the Original Squishmallows Trade Dress. Kellytoy Worldwide's common law trade dress is distinctive, and furthermore, have acquired secondary meaning.

111. The infringing products imported, advertised, distributed, offered for sale and sold by Defendants incorporate matter constituting replicas and imitations of Kellytoy Worldwide's common law trade dress. Such unauthorized use by Defendants of Kellytoy Worldwide's common law trade dress constitutes common law trade dress infringement and unfair competition, and is likely to cause confusion and mistake in the minds of the trade and the purchasing public as to the source of the products and to cause purchasers to believe such products are authentic products of Kellytoy Worldwide when, in fact, they are not.

112. Upon information and belief, Defendants have willfully and intentionally misappropriated one or more aspects of Kellytoy Worldwide's common law trade dress with the intent of causing confusion, mistake, and deception as to the source of its goods and with the intent to palm off its goods as those of Kellytoy Worldwide and to place others in the position to

palm off its goods as those of Kellytoy Worldwide, and as such, Defendants have committed trade dress infringement and unfair competition under the common law.

113. By such actions in infringing' Kellytoy Worldwide's common law trade dress, Defendants are improperly trading upon the enviable reputation and goodwill of Kellytoy Worldwide and impairing' Kellytoy Worldwide's valuable rights in and to such trade dress.

114. Kellytoy is informed and believes, and thereupon alleges, that Defendants committed the above alleged acts in conscious disregard of Kellytoy Worldwide's rights, and Kellytoy Worldwide is therefore entitled to exemplary and punitive damages pursuant to the common law of the State of Illinois.

115. Kellytoy Worldwide has no adequate remedy at law. The conduct of Defendants has caused and, if not enjoined, will continue to cause, irreparable damage to Kellytoy Worldwide's rights in and to its trade dress, and to Kellytoy Worldwide's business, reputations, and goodwill.

FIFTH CAUSE OF ACTION

(Deceptive Trade Practices Pursuant to 815 ILCS §§ 510/1, *et seq.*) (All Defendants)

116. Kellytoy Worldwide repeats, realleges and incorporates each and every allegation made above as if fully set forth herein.

117. Defendants have knowingly and willfully engaged in deceptive trade practices within the meaning of the Illinois Uniform Deceptive Trade Practices Act, 815 ILCS Sections 510/1 *et seq.* by causing likelihood of confusion misleading as to the source, origin or sponsorship of the parties' respective products, causing likelihood of confusion or of misunderstanding as to the affiliation, connection or association of Defendants with the Original

Squishmallows Trade Dress and using deceptive representations or designations of origin in connection with Defendants' products.

118. The foregoing acts of Defendants constitute willful, deceptive acts and practices in the conduct of business, trade and/or commerce, in violation of Illinois Uniform Deceptive Trade Practices Act, 815 ILCS Sections 510/1 *et seq.*, for which Kellytoy Worldwide is entitled to injunctive relief, actual damages, treble damages, punitive damages, attorneys' fees, and costs. The foregoing acts of Defendants will create a likelihood of injury to the public image and business reputation of Kellytoy Worldwide, in that the public will likely associate Defendants' goods with Kellytoy Worldwide and/or Kellytoy Worldwide's goods, and cause the dilution of the distinctive quality of Kellytoy Worldwide's Original Squishmallows Trade Dress, and Kellytoy Worldwide's common law trade dress in violation of the Illinois Uniform Deceptive Trade Practices Act, 815 ILCS §§ 510/1 *et seq.*, for which Kellytoy Worldwide is entitled to injunctive relief.

119. The foregoing acts of Defendants were calculated and designed intentionally to mislead and deceive the public and trade as to the identity of Defendants or as to the connection of Defendants with Kellytoy Worldwide, in violation of 815 ILCS §§ 510/1 *et seq.*, for which Kellytoy Worldwide is entitled to injunctive relief.

120. The unauthorized use by Defendants of the Original Squishmallows Trade Dress is causing and is likely to cause substantial injury to the public and to Kellytoy Worldwide.

SIXTH CAUSE OF ACTION

(Illinois Common Law Unfair Competition) (All Defendants)

121. Kellytoy Worldwide repeats, realleges and incorporates each and every allegation made above as if fully set forth herein.

122. Defendants' acts constitute common law trade dress infringement in violation of state common law, including the common law of the State of Illinois. Such acts of common law trade dress infringement constitute unfair competition within the meaning of the common law, including the common law of the State of Illinois.

123. Upon information and belief, Defendants' conduct was and continues to be willful, intentional, and in bad faith.

124. Defendants' acts have caused, and continue to cause, irreparable harm to Kellytoy Worldwide, and Kellytoy Worldwide is left with no adequate remedy at law such that the damage to Kellytoy Worldwide will continue unless and until enjoined by the Court.

SEVENTH CAUSE OF ACTION

(Common Law Trademark Infringement) (All Defendants)

125. Kellytoy USA repeats, realleges and incorporates each and every allegation made above as if full set forth herein.

126. This claim arises under the common law of this State relating to trademark infringement. This Court has jurisdiction over the subject matter of this claim pursuant to the provisions of 28 U.S.C. § 1338(b), this being a claim of unfair competition joined with a substantial and related claim under the Trademark Laws of the United States, and under 28 U.S.C. § 1367.

127. Kellytoy USA is the owner of all right, title, and interest in and to the PUFFY Mark used by Kellytoy USA by virtue of its extensive manufacture and sale of products bearing such trademark as set forth in the preceding paragraphs of this Complaint. In particular, because of their enormous sales and publicity, Kellytoy USA has acquired common law trademark rights

in and to the PUFFY Mark. Kellytoy USA's common law trademark is distinctive, and furthermore, has acquired secondary meaning.

128. The infringing products imported, advertised, distributed, offered for sale and sold by Defendants incorporate matter constituting replicas and imitations of Kellytoy USA's common law trademark. Such unauthorized use by Defendants of Kellytoy USA's common law trademark constitutes common law trademark infringement and unfair competition, and is likely to cause confusion and mistake in the minds of the trade and the purchasing public as to the source of the products and to cause purchasers to believe such products are authentic products of Kellytoy USA when, in fact, they are not.

129. Upon information and belief, Defendants have willfully and intentionally misappropriated one or more aspects of Kellytoy USA's common law trademark with the intent of causing confusion, mistake, and deception as to the source of its goods and with the intent to palm off their goods as those of Kellytoy USA and to place others in the position to palm off its goods as those of Kellytoy USA, and as such, Defendants have committed trademark infringement and unfair competition under the common law.

130. By such actions in infringing' Kellytoy USA's common law trademark, Defendants are improperly trading upon the enviable reputation and goodwill of Kellytoy USA and impairing' Kellytoy USA's valuable rights in and to such trademark.

131. Kellytoy USA is informed and believes, and thereupon alleges, that Defendants committed the above alleged acts in conscious disregard of Kellytoy USA's rights, and Kellytoy USA is therefore entitled to exemplary and punitive damages pursuant to the common law of the State of Illinois.

132. Kellytoy USA has no adequate remedy at law. The conduct of Defendants has caused and, if not enjoined, will continue to cause, irreparable damage to Kellytoy USA's rights

in and to its trademark, and to Kellytoy USA's business, reputation, and goodwill.

EIGHTH CAUSE OF ACTION

(Deceptive Trade Practices Pursuant to 815 ILCS §§ 510/1, *et seq.*) (All Defendants)

133. Kellytoy USA repeats, realleges and incorporates each and every allegation made above as if set forth herein.

134. Defendants have knowingly and willfully engaged in deceptive trade practices within the meaning of the Illinois Uniform Deceptive Trade Practices Act, 815 ILCS Sections 510/1 *et seq.* by causing likelihood of confusion misleading as to the source, origin or sponsorship of the parties' respective products, causing likelihood of confusion or of misunderstanding as to the affiliation, connection or association of Defendants with the PUFFY Mark and using deceptive representations or designations of origin in connection with Defendants' products.

135. The foregoing acts of Defendants constitute willful, deceptive acts and practices in the conduct of business, trade and/or commerce, in violation of Illinois Uniform Deceptive Trade Practices Act, 815 ILCS Sections 510/1 *et seq.*, for which Kellytoy USA is entitled to injunctive relief, actual damages, treble damages, punitive damages, attorneys' fees, and costs. The foregoing acts of Defendants will create a likelihood of injury to the public image and business reputation of Kellytoy USA, in that the public will likely associate Defendants' goods with Kellytoy USA and/or Kellytoy USA's goods, and cause the dilution of the distinctive quality of Kellytoy USA's PUFFY Mark in violation of the Illinois Uniform Deceptive Trade Practices Act, 815 ILCS §§ 510/1 *et seq.*, for which Kellytoy USA is entitled to injunctive relief.

136. The foregoing acts of Defendants were calculated and designed intentionally to mislead and deceive the public and trade as to the identity of Defendants or as to the connection

of Defendants with Kellytoy USA, in violation of 815 ILCS §§ 510/1 *et seq.*, for which Kellytoy USA is entitled to injunctive relief.

137. The unauthorized use by Defendants of the PUFFY Mark is causing and is likely to cause substantial injury to the public and to Kellytoy USA.

NINTH CAUSE OF ACTION

(Illinois Common Law Unfair Competition) (All Defendants)

138. Kellytoy USA repeats, realleges and incorporates each and every allegation made above as if fully set forth herein.

139. Defendants' acts constitute common law trademark infringement in violation of state common law, including the common law of the State of Illinois. Such acts of common law trademark infringement constitute unfair competition within the meaning of the common law, including the common law of the State of Illinois.

140. Upon information and belief, Defendants' conduct was and continues to be willful, intentional, and in bad faith.

141. Defendants' acts have caused, and continue to cause, irreparable harm to Kellytoy USA, and Kellytoy USA is left with no adequate remedy at law such that the damage to Kellytoy Worldwide will continue unless and until enjoined by the Court.

JURY DEMAND

Kellytoy Worldwide and Kellytoy USA demand a trial by jury on all issues.

PRAYER FOR RELIEF

WHEREFORE, Kellytoy Worldwide and Kellytoy USA pray for judgment against Defendants as follows:

1. That Defendants, their officers, members, directors, agents, servants, employees, successors, licensees, representatives, successors, assigns, and all persons acting in concert or participation with them, be preliminarily and permanently enjoined and restrained from:

- (i) Manufacturing, importing, distributing, advertising, offering to sell or selling the Infringing Plush or any colorable imitations of the PUFFY Mark or the Original Squishmallows Trade Dress;
- (ii) Using the Original Squishmallows Trade Dress or any confusingly similar trade dress in connection with plush or other toys;
- (iii) Using the PUFFY Mark or any confusingly similar mark, including without limitation PUFFIES, in connection with plush toys or other goods;
- (iii) Using the Original Squishmallows Trade Dress, or any confusingly similar mark, in connection with the advertisement, offer to sell or sale of any toy products;
- (iv) Using any false designation of origin, or representing or suggesting directly or by implication that Defendants, or any brands or other sources identifiers used by Defendants, or their toys, are affiliated with, associated with, authorized by, or otherwise connected to Kellytoy, or that Defendants are authorized by Kellytoy to use the PUFFY Mark or the Original Squishmallows Trade Dress;
- (v) Infringing or contributing to the infringement of any of Kellytoy's trademarks or trade names, including without limitation the PUFFY Mark and/or Original Squishmallows Trade Dress, or otherwise engaging in unfair competition with Kellytoy in any manner or engaging in any conduct

tending to falsely represent or likely to confuse, mislead or deceive suppliers, purchasers, or any member of the public into thinking that Defendants or any of their products are affiliated with Kellytoy or that Kellytoy has otherwise sponsored, approved, or licensed any products or services of Defendants;

- (vi) Engaging in any other activity constituting unfair competition with Kellytoy, or constituting infringement of the PUFFY Mark or the Original Squishmallows Trade Dress; and
- (vii) Assisting, aiding, or abetting any other person or business entity in engaging or performing any of the activities referred to in subparagraphs (i) through (vi) above, or effecting any assignments or transfers, forming new entities or associations, or utilizing any other device for the purpose of circumventing or otherwise avoiding the prohibitions set forth in subparagraphs (i) through (vi) above;

2. That Defendants be directed to file with the Court and serve on Kellytoy, within thirty (30) days after entry of a final injunction, a report in writing under oath setting forth in detail the manner and form in which Defendants have complied with the injunction;

3. That Kellytoy USA has superior rights to exclusive use in the PUFFY Mark and that Kellytoy Worldwide has superior rights to exclusive use in the Original Squishmallows Trade Dress in connection with toys and/or pillows vis-à-vis Defendants;

4. That Defendants shall not in the future file or maintain an application for registration or registration of any mark that includes “puffy” or “puffies” or any designation(s) confusingly similar thereto with the United States Patent and Trademark Office or any other governmental or state authority;

5. That the Court direct any third parties providing services to Defendants in connection with any infringing and/or enjoined conduct, including social media platforms (*e.g.*, Instagram, Facebook, Twitter), online marketplaces (*e.g.*, Alibaba, eBay, Etsy, AliExpress, Amazon, Taobao), online payment providers, including credit card companies (*e.g.*, PayPal, Visa) and other service providers (*e.g.*, Google, GoDaddy, LiveChat, Shopify) to cease providing services to Defendants in connection with the offer for sale and sale of the Infringing Plush or any other products using or embodying the PUFFY Mark, the Original Squishmallows Trade Dress, or any design, word or designation confusingly similar to the PUFFY Mark and/or the Original Squishmallows Trade Dress, including without limitation, PUFFIES, or any alternate spellings thereof;

6. That Defendants be required to pay Kellytoy such damages as it has sustained as a consequence of Defendants' infringement of the of each of the Original Squishmallows Trade Dress and the PUFFY Mark and trebling of those damages under 15 U.S.C. § 1117;

7. Adjudge that each of the Defendants, by their unauthorized use of Kellytoy's PUFFY Mark and the Original Squishmallows Trade Dress for plush toys, and such other acts as it may have undertaken relating to the PUFFY Mark and/or Original Squishmallows Trade Dress, have violated Kellytoy's rights under 15 U.S.C. §§ 1114, 1125(a) and 1125(d), under Illinois Uniform Deceptive Trade Practices Act, 815 ILCS Sections 510/1 *et seq.*, Illinois state law, and under common law, and that they have done so willfully and for the purpose of violating Kellytoy's rights and damaging Kellytoy's goodwill and reputation in the PUFFY Mark and the Original Squishmallows Trade Dress;

8. Direct Defendants to provide Kellytoy with an identification in writing of any and all entities that are presently using the PUFFY Mark or the Original Squishmallows Trade Dress

in the United States on Defendants' behalf and inform them that they must immediately cease such use;

9. Direct Defendants to immediately recall any and all merchandise previously provided to any United States entity bearing or using the PUFFY Mark (including, e.g., the PUFFYIES mark), or the Original Squishmallows Trade Dress;

10. Enter an order, pursuant to 15 U.S.C § 1118, directing Defendants to deliver for destruction all products, brochures, marketing materials, decals, stickers, signs, prints, packages, receptacles, wrappers, boxes, and advertisements in their possession or under their control, bearing any unauthorized copy of any of the PUFFY Mark or the Original Squishmallows Trade Dress, or any simulation, reproduction, counterfeit, copy, confusingly similar likeness, or colorable imitation thereof, including without limitation the PUFFIES designation, and all plates, molds, matrices, programs and other means of making same;

11. That each Defendant provide Kellytoy in writing with the following information relating to Defendants' goods marketed, advertised, offered for sale, or sold under either or both of the PUFFY Mark and/or the Original Squishmallows Trade Dress:

- (i) the name, address and telephone number of each and every United States entity to whom Defendants have made available or otherwise provided any such products; and
- (ii) the total number of units distributed and sold;
- (iii) the total number of units remaining in inventory; and
- (iv) a full accounting as to the precise dollar amount of such products made available or provided and the profits recognized by Defendants in connection with such actions;

12. Direct Defendants to pay the costs of corrective advertising;

13. Direct Defendants to pay Plaintiff's attorneys' fees and costs incurred in initiating and prosecuting this action;

14. Direct Defendants to pay punitive damages and exemplary damages according to proof;

15. That Kellytoy recover its actual damages, Kellytoy's lost profits, and Defendant's profits arising from Defendants' conduct complained-of herein;

16. That the Court award enhanced profits and treble damages;

17. That Kellytoy be awarded interest, including pre-judgment interest, on the foregoing sums;

18. That the Court direct such other actions as the Court may deem just and proper to prevent the public from deriving the mistaken impression that any products or services offered, advertised, or promoted by or on behalf of Defendants are authorized by Kellytoy or related in any way to Kellytoy's products or services;

19. Providing that Defendants' conduct constitutes willful, deceptive acts and practices in the conduct of business, trade and/or commerce, in violation of the Illinois Uniform Deceptive Trade Practices Act, 815 ILCS Sections 510/1 et seq. and common law;

20. Providing that Defendants' conduct will create a likelihood of dilution and injury to Kellytoy's business reputation in violation of the Illinois Uniform Deceptive Trade Practices Act, 815 ILCS Sections 510/1 et seq. and common law;

21. Providing that Defendants used Kellytoy USA's PUFFY Mark and/or Kellytoy Worldwide's Original Squishmallows Trade Dress with the intent to cause confusion and to deceive the public in violation of the Illinois Uniform Deceptive Trade Practices Act, 815 ILCS Sections 510/1 et seq. and common law;

22. Providing that Defendants have injured Kellytoy by depriving it of sales of its genuine goods and services, by injuring its business reputation, and by passing off Defendants' goods as Kellytoy's goods and/or created a likelihood of confusion and/or false designation of origin, all in violation of the common law of the Illinois Uniform Deceptive Trade Practices Act, 815 ILCS Sections 510/1 et seq. and common law;

23. Providing that Defendants' willfully misappropriated and used the PUFFY Mark and/or Original Squishmallows Trade Dress and such conduct constitutes misappropriation, unfair competition and unjust enrichment, all in violation of the common law of the Illinois Uniform Deceptive Trade Practices Act, 815 ILCS Sections 510/1 et seq. and common law; and

24. For such other and further relief as the Court may deem just and proper.

DATED: May 21, 2020

Respectfully submitted,

/ s / Dean D. Niro

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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that the foregoing document was served upon all counsel of record via filing with CM/ECF on May 21, 2020.

/s/ Mark B. Mizrahi
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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

KELLY TOYS HOLDINGS, LLC,
KELLYTOY WORLDWIDE, INC., and
KELLYTOY (USA), INC.,

Plaintiffs,

VS.

TY INC. and DOES 1- 10,

Defendants.

Case No. 1:20-cv-00748

SECOND AMENDED COMPLAINT

Plaintiffs KELLY TOYS HOLDINGS, LLC, a Delaware limited liability company (“Kellytoy Holdings”), KELLYTOY WORLDWIDE, INC., a California corporation (“Kellytoy Worldwide”) and KELLYTOY (USA), INC., a California corporation (“Kellytoy USA”) (collectively, “Kellytoy”) bring this action against defendant TY INC. (“Ty”) and DOES 1 through 10 (collectively, “Defendants”) for injunctive relief and damages under the laws of the United States and the State of Illinois, as follows:

JURISDICTION AND VENUE

1. This action arises under the trademark laws of the United States, 15 U.S.C. §§ 1114 and 1125(a), under the statutory and common law of trademark/trade dress infringement and unfair competition.
2. This Court has jurisdiction under 28 U.S.C. §§ 1331, 1338, and 1367, and 15 U.S.C. §§ 1114, 1116, 1117, 1121, and 1125.
3. Venue lies in this judicial district pursuant to 28 U.S.C. § 1391 and 1400(a).
4. This Court has personal jurisdiction over Defendants, as Defendants are doing

5. Ty has purposely and willfully directed its intentional misuse and infringement of Kellytoy's trademark and trade dress rights in the State of Illinois with the knowledge that the actions have caused damage within the State of Illinois.

6. By transacting business with customers in this District, and by using the goodwill and reputation built by Kellytoy, in this district, Ty has purposely availed itself of the privilege of conducting business in this judicial district and has established sufficient contacts with the State of Illinois such that it is subject to jurisdiction in Illinois.

7. To the extent Kellytoy's claims arise from Illinois statutory and/or common law, this Court has proper jurisdiction because it bears a logical relationship to the aggregate core of operative facts relating to Kellytoy's claims under the Lanham Act.

8. Defendant Ty is a corporation organized under the laws of the state of Delaware with its principal place of business in 250 Chestnut Avenue, Westmont, Illinois 60559.

NATURE OF THE ACTION

9. This action, as alleged below, arises specifically because defendant Ty has embarked on a transparent campaign to hijack Kellytoy's longstanding and well-earned goodwill in the plush toy marketplace by infringing on Kellytoy's registered trademark and distinctive trade dress. Ty, in its haste to sow customer confusion and consequently draw business from Kellytoy, has employed a name, PUFFIES, that is a virtual and linguistic replica of Kellytoy's registered PUFFY® trademark. Indeed, the Ty mark sounds the same, looks the same, means essentially the same thing, and is used for similar goods as Kellytoy uses in connection with its long established PUFFY® mark. That duplication is plainly deliberate – Ty is attempting to confuse customers into believing, falsely, that its goods are associated with and derive from the same source of origin as Kellytoy's products. Beyond all that, Ty is selling and/or offering for

sale its competing plush toys (bearing the infringing PUFFIES mark) in the same tradeshow and trade channels as Kellytoy's products, all but assuring the intended and expected customer confusion.

10. In addition, Kellytoy's SQUISHMALLOW branded plush toys ("Squishmallows") – representative samples of which are depicted in **Exhibit 1** hereto – are one of the world's hottest plush toy lines. Kellytoy's Squishmallows feature a highly distinctive and widely recognized trade dress (described below), which Kellytoy Worldwide pioneered and created. Kellytoy actively markets its Squishmallows through numerous media outlets, including, without limitation, on social media, at tradeshow, through Squishmallows.com, amazon.com, walmart.com, walgreens.com and target.com, and on Kellytoy's website and social media accounts, depicting images of its proprietary Squishmallows line of plush toys.

11. The explosion in popularity of Kellytoy's Squishmallows, and the resulting and widespread customer and industry recognition, has unfortunately led to illegal imitation by some of Kellytoy's competitors. Defendants are merely the latest, though most brazen and capable, of the intellectual property pirates seeking to conscript Kellytoy's goodwill for unfair competitive purposes. Indeed, Kellytoy has discovered that defendant Ty has been making and offering for sale to customers nine (9) knock-off products under the moniker Squish-A-Boos that incorporate Kellytoy's Original Squishmallows Trade Dress (defined below) for distribution to customers throughout the United States and within this state and district that infringe upon the Original Squishmallows Trade Dress.

12. Accordingly, Kellytoy has no alternative but to take steps to preserve and protect its intellectual property from this naked attack, and it thus has filed this action for trademark infringement, trade dress infringement, unfair competition and false designation of origin under the Lanham Act, 15 U.S.C. § 1125(a), Illinois unfair competition laws, Illinois Deceptive Trade

Practices Law pursuant to 815 ILCS §§ 510/1, *et seq.* and the common law trade dress infringement.

THE PARTIES

13. Kelly Toys Holdings, LLC is a Delaware limited liability company with its principal place of business located in Los Angeles, California.

14. Kellytoy (USA), Inc. is a California corporation with its principal place of business located in Los Angeles, California.

15. Kellytoy Worldwide, Inc. is a California corporation with its principal place of business located in Los Angeles, California. (Kellytoy Holdings, Kellytoy USA and Kellytoy Worldwide will sometimes be referred to collectively herein as “Kellytoy.”)

16. Kellytoy is in the business of developing, manufacturing and selling children’s toys including, among other things, plush toys.

17. After the initial complaint in this action was filed, Kellytoy Holdings acquired ownership of the intellectual property rights at issue in this action from Kellytoy Worldwide and Kellytoy USA. After Kelly Toys Holdings acquisition of the intellectual property rights, Kellytoy Worldwide and Kellytoy USA continue to operate and use the intellectual property rights with Kelly Toys Holdings, LLC’s consent, such that Kellytoy Worldwide and Kellytoy USA continue have a beneficial interest therein.

18. Defendant Ty Inc. (“Ty”) is a Delaware corporation with its principal place of business in 250 Chestnut Avenue, Westmont, Illinois 60559.

19. Ty is in the business of manufacturing and selling children’s toys, including plush toys.

20. The true names and capacities of defendants sued herein as DOES 1-10, inclusive, are unknown to Kellytoy, who therefore sues said defendants by such fictitious names. Kellytoy

will amend this Complaint to allege their true names and capacities when the same are ascertained.

21. Upon information and belief, at all relevant times mentioned in this Complaint, Defendants, and each of them, were acting in concert and active participation with each other in committing the wrongful acts alleged herein, and were the agents of each other and were acting within the scope and authority of that agency and with the knowledge, consent and permission of one another.

BACKGROUND FACTS

Kellytoy and Its Protected Intellectual Property Rights

22. Kellytoy USA and Kellytoy Worldwide are innovative and highly successful creators, manufacturers, distributors and sellers of unique plush toys.

23. Kellytoy USA has been in business for approximately three decades and in that time has developed a reputation for producing high quality, unique, and creative plush toys that are highly prized in the industry and in widespread demand by the consuming public. Similarly, Kellytoy Worldwide has been in business for nearly two decades and developed its own reputation for producing high quality, unique, and creative plush toys, including, most recently, its highly successful Squishmallows line of plush toys in connection with the SQUISHMALLOW® and SQUISHMALLOWS brands. (*See, e.g., Exhibit 1.*)

24. Kellytoy devotes extensive time and resources promoting and preserving its image and identity and the image and identity of its high-quality plush toys. That includes, without limitation, creating distinctive designs and marks for use on its products, seeking U.S. trademark and copyright registrations for such marks and designs, and taking all steps necessary to preserve and protect its intellectual property.

Kellytoy's PUFFY® TRADEMARK

25. In particular, by assignment from Kellytoy USA, Kellytoy Holdings is the sole and exclusive owner of United States Federal Trademark Registration No. 4517007 for the trademark PUFFY (the “PUFFY Mark”) for “plush toys, not intended for pets.” A true and correct copy of United States Certificate of Registration No. 4517007 for the PUFFY Mark is attached as **Exhibit 2**.

26. Prior to the assignment in favor of Kellytoy Holdings, Kellytoy USA was the sole owner of all right, title and interest in and to the PUFFY Mark and the United States trademark registration therefor (occasionally referred to as the “Mark”), which is now owned by Kellytoy Holdings.

27. Kellytoy made widespread and prominent use of the PUFFY Mark in connection with the marketing and sale of its goods under that trademark since at least as early as 2009, such that, in addition to being inherently distinctive, the mark has also acquired distinctiveness in the minds of consumers as designating a single source. As a result of such promotion and sales, coupled with the reputation of the high quality of Kellytoy’s goods sold in connection with the PUFFY Mark, the PUFFY Mark has attained goodwill among consumers nationally – such goodwill now being owned by Kellytoy Holdings. There has been continuous goodwill and acquired distinctiveness in the PUFFY Mark regardless of the acquisition by Kellytoy Holdings. Goods bearing the PUFFY Mark continue to be sold in interstate commerce by Kellytoy.

Kellytoy's SQUISHMALLOW® TRADEMARK

28. By assignment from Kellytoy Worldwide, Kellytoy Holdings is the sole and exclusive owner of United States Federal Trademark Registration No. 5454574 for the trademark SQUISHMALLOW, often also designated as SQUISHMALLOWS, (the “SQUISHMALLOW Mark”) for “plush toys.” A true and correct copy of United States Certificate of Registration No.

5454574 for the SQUISHMALLOW Mark is attached as **Exhibit 3**.

29. Kellytoy has made widespread and prominent use of the SQUISHMALLOW Mark in connection with the marketing and sale of its goods under that trademark since at least as early as 2017, such that, in addition to being inherently distinctive, the mark has also acquired distinctiveness in the minds of consumers as designating a single source. As a result of such promotion and sales, coupled with the reputation of the high quality of Kellytoy's goods sold in connection with the SQUISHMALLOW Mark, the SQUISHMALLOW Mark has attained goodwill among consumers nationally— such goodwill now being owned by Kellytoy Holdings. There has been continuous goodwill and acquired distinctiveness in the SQUISHMALLOW Mark regardless of the acquisition by Kellytoy Holdings. Goods bearing the SQUISHMALLOW Marks continue to be sold in interstate commerce by Kellytoy.

Kellytoy's Original Squishmallows Trade Dress

30. In 2016, Kellytoy Worldwide conceived of and began creating its original Squishmallows line of plush toy designs that shares common, unique features distinguishing them from the goods of others (the "Original Squishmallows line"), representative examples of which are depicted on **Exhibit 1** hereto. Most of these designs are the subject of United States Copyright Registrations or pending applications therefor, and each is sold in commerce under the Squishmallows brand. In essence, Kellytoy created a distinctive line of plush toys that has spawned a cultural craze in which numerous imitators have emerged, not the least of which are Defendants.

31. Since that time, in addition to its Original Squishmallows line, Kellytoy has introduced various other lines of Squishmallows branded plush toys, such as its Squishmallows Stackables line, its Squishmallows Hugmees line, among others. In this action, Kellytoy only asserts its trade dress rights garnered in its Original Squishmallows line of plush toys, as more

fully described herein below, which has comprised approximately 95% of the total Squishmallows branded plush toys sold by Kellytoy to date.

32. Kellytoy Holdings is the sole owner of all right, title and interest in and to the Original Squishmallows line that possesses unique, recognizable and distinguishing features that are common across much of the Original Squishmallows line. From 2016 to the present, Kellytoy has expended large sums of money in developing, advertising and promoting the Original Squishmallows Trade Dress (defined below), and the product designs bearing it, through the United States. In fact, Kellytoy has an annual marketing budget of approximately \$1,000,000 and is spending approximately \$500,000 annually in direct to consumer and business-to-business advertising in connection with its Squishmallows branded goods.

33. Due to Kellytoy's distinctive trade dress, coupled with its unique designs, extensive marketing efforts, media coverage, and market penetration, the Original Squishmallows Trade Dress has acquired distinctiveness in the marketplace when applied to plush toys. In fact, because of Kellytoy's extensive promotional activities and widespread display of plush toys bearing the Original Squishmallows Trade Dress directed to the public, and a consequence of Kellytoy's well-earned reputation for fairness and integrity in dealings with its customers, the relevant consuming public has come to recognize and associate plush toys bearing embodying the trade dress as high quality goods connected with or offered by Kellytoy. As a result, that trade dress has valuable goodwill and consumer recognition associated with it and has come to symbolize the exemplary reputation of Kellytoy.

34. Consistent with that advertising and marketing scope, Kellytoy sells a broad range of Squishmallows branded plush toys in its Original Squishmallows line featuring the brand's iconic trade dress, and whose overall look, feel and image – and in particular but without limitation its distinctive combination of shapes, colors, textures and graphics – serve as a

distinctive source identifier to the consuming public. Though not easily reduced to writing, these features include: (1) substantially egg/bell shaped plush toys depicting various similarly shaped fanciful renditions of animals/characters; (2) simplified Asian style Kawaii faces with repeating and complementary rounded/oval shaped graphics depicting features on the characters themselves (such as eyes, snouts and bellies) and which conform to and support the overall egg/bell shape of the toys; (3) embroidered facial features, such as nostrils, eyes, and/or mouths; (4) distinctive contrasting and non-monochrome coloring; and (5) short-pile velvety velour-like textured exterior with a light and silky memory foam-like stuffing providing an extremely soft and squeezable marshmallow feel. These features, and the resulting overall look and feel of the toys bearing them, are more fully depicted, without limitation, in **Exhibit 1** hereto (collectively, together with **Exhibit 1**, the “Original Squishmallows Trade Dress”).

35. Kellytoy has, beginning in 2016 and continuing without interruption, expended a great deal of time, effort, and money in the promotion of its Original Squishmallows line. And due to Kellytoy’s distinctive designs, robust marketing efforts, media coverage, and market penetration, the Original Squishmallows Trade Dress has acquired distinctiveness in the marketplace when applied to plush toys. As a further result of Kellytoy’s extensive promotional activities and widespread display of its Original Squishmallows line directed to the public and as a result of the fairness and integrity mentioned above, the relevant consuming public has come to recognize and associate plush toys bearing the Original Squishmallows Trade Dress as high quality goods connected with or offered by a single source, Kellytoy. The Original Squishmallows Trade Dress thus embodies valuable goodwill and consumer recognition associated with it and has come to symbolize the valuable goodwill and reputation of Kellytoy.

36. Beyond merely being original and inherently distinctive, the Original Squishmallows Trade Dress is also widely recognized by consumers. A simple Internet search

using the Google search engine yields, for example, about 1,370,000 “hits” for the search term “Squishmallows.”

37. The scope of Kellytoy’s sales reflects the market penetration of its intellectual property. The company markets and sells its Squishmallows branded plush not only through thousands of retail stores nationwide, but additionally on its website located at <squishmallows.com> featuring dozens of copyright-protected photographs of its plush toys and models holding its Squishmallows. Copies of selected pages from website located at <squishmallows.com> are attached as **Exhibit 4**, which specifically call out the fact that the Squishmallows are the “Original” and that the “shape, look, feel, and texture of the Squishmallows branded plush toys constitute Kelly Toys Holdings, LLC proprietary trade dress.” Kellytoy’s Squishmallow website traffic has, not surprisingly, grown exponentially since its launch in 2017, and has now reached an average in excess of 5,500 visits per day.

38. Kellytoy also actively engages in promoting its Original Squishmallows line of branded plush toys through its numerous social media accounts, including on Instagram, Facebook, and Twitter. Indeed, Kellytoy’s legion of loyal fans of its line of Original Squishmallows line of branded plush toys have been extremely engaged on social media, including Facebook and Instagram, demonstrating their awareness and affection for Kellytoy’s Original Squishmallows line. For example, the average Squishmallows post likes on Instagram, for example, hovering over 2000+ per post and 45-100 average comments per post. In fact, Kellytoy’s Squishmallows branded plush toys have garnered over 200 Million media impressions and since July 21, 2017, Kellytoy’s paid placements on Facebook and Instagram campaigns have reached more than 23.6 MILLION unique individuals and 83.7 MILLION impressions.

39. Kellytoy uses digital ads to advertise its Original Squishmallows line of plush toys.

Owing to their immense popularity, these ads promoting specific retailers have average click through rates of 30+% (the industry average is rates of 30+% (the industry average is 1-2%).

40. Further adding to their recognition and secondary meaning in the marketplace, Squishmallows have been featured in over 300 publications, including magazines, press articles, reviews, and videos, as set forth in greater detail in **Exhibit 5** hereto, including many mainstream media publications such as the *Washington Post*, the *Chicago Tribune*, the *Daily Harold*, *Okay! Magazine*, among others. By way of example only, the Original Squishmallows line has been also recognized by: (1) The *Washington Post* and *Consumer Reports* on their 2017 Holiday Gift Guides; (2) *LA Parent* in its October 2017 issue, under the “Products We Love” section, which specifically identified designs from the Original Squishmallows line; and (3) *OK! Magazine* in its August 21, 2017 issue, which, as depicted below, featured Squishmallows and described them in flattering terms, stating “Cuddly as they are cute, they make great couch pals, pillows and bedtime buddies in any home. Collect the whole squad! squishmallows.com.”



41. There are myriad further examples of the popularity and market penetration of the Original Squishmallows line. To name just a few, designs from the Original Squishmallows line were featured in the October 2017 issues of *L.A. Parent Magazine*, *City Parent Magazine*, and *San Diego Family Magazine* and included in the 2017 gift guides for various publications, including in *The Washington Post*, *The Houston Chronicle*, and *L.A. Parent*.

42. In fact, Kellytoy's Original Squishmallows line sold out through Walgreens.com during their Gift of the Week promotion in early November 2017, as well as exceeding all sales goals for the campaign, both online and in stores.

43. Reflecting the quality of the goods, Kellytoy's Original Squishmallows line has also received numerous industry awards and product recommendation lists, including by the National Parenting Product Awards, Parents' Choice, and TTPM, as more fully set out in **Exhibit 5**. Thus, for example, Kellytoy's Original Squishmallows line was named by *Toy Insider* as one of the "Top Holiday Toys," made the cover the September/October 2017 *Toy Book Magazine*, and have been featured in numerous other trade magazines, such as, *Teddy Bear and Friends Magazine* and *Animal Tales Magazine*.

44. The popular blog *Trendy Mom Reviews* listed Kellytoy's Original Squishmallows line as one of "The Best Gifts for 2018!" Similarly, the popular blog *Two Kids And A Coupon* did its own review of Kellytoy's Original Squishmallows line of branded plush, saying, among other things, that they are "a gift for anyone on our list this holiday!"

45. The Original Squishmallows line of branded toys were also: (1) named one of "The Best New Toys" by Minnesota Parent Magazine! and was named a Great Holiday Gifts For Littles by Texas Lifestyle Magazine!; (2) selected as among the "5 Editor's Picks From Toy Fair" 2019 by *Gifts & Decorative Accessories*; (3) featured by *The Toy Insider* in connection with its March 13, 2019 article entitled "Tips for Tackling Testing & Student Stress"; (4)

featured on the cover of *The Toy Book's* "Plush Issue" and its Toy Fair New York 2019 issue, in *The Toy Book's* August 5, 2019 issue (specifically featuring the upcoming Halloween Squishmallows line), and in *The Toy Book's* issue (specifically featuring the Squishmallows branded turtle) on May 15, 2019; (5) featured in *TFE Toys & Family Entertainment's* NYC Toy Fair 2019 issue; and (6) won the *Parent and Teacher Choice Award* for 2019 from HowtoLearn.com.

46. Kellytoy's Original Squishmallows line has become so popular that a selection of designs were included in the celebrity gift bags distributed to the celebrity attendees in connection with the 2019 Teen Choice Awards, including Jenn Ortega, Lucy Hale, Lil Nas X, Sarah Hyland, One Republic, among numerous others.

47. This widespread publicity and recognition has occurred in conjunction with Kellytoy's advertising efforts concerning the Original Squishmallows line, which, as alleged above, have comprised consistent and robust marketing campaigns, including email campaigns, social media posts, and direct to consumer advertising. Kellytoy's Squishmallows currently have over 169,000 Instagram followers, over than 95,000 Facebook followers, and more than 60,000,000 views on the popular TikTok video app – more than many longer-existing and well-known plush brands. To its followers, Kellytoy regularly publishes photographs of its Squishmallows plush toys. Many of these followers, in turn, share these posts with their friends and social media followers. A copy of Squishmallows Instagram page, bearing photographs of Squishmallows plush toys, is attached as **Exhibit 6**, which specifically calls out the fact that the "shape, look, feel, and texture of the Squishmallows branded plush toys constitute Kellytoy Worldwide, Inc.'s proprietary trade dress."

48. In addition, hundreds of well-known YouTube influencers and vloggers have shared and posted images and videos of themselves holding plush toys in Kellytoy's Original

Squishmallows line of products. Tens of thousands of consumers have done the same through numerous media platforms, including, Facebook, Instagram, Twitter, TikTok, Pinterest and YouTube. These posts have generated millions of “likes” and “shares” and all feature, among other things, depictions of Kellytoy’s Original Squishmallows line of plush toys. In fact, several members of the public have created their own Instagram fan accounts and Facebook groups, all bearing content featuring the Original Squishmallows line of branded plush toys.

49. Kellytoy’s Squishmallows are listed amongst the leading global brands and toys such as Hatchimals, Hasbro, RB, Hot Wheels, NERF, and Spin Master by several industry publications.

50. As a direct result of Kellytoy’s efforts at promoting and building its brand, Kellytoy’s Original Squishmallows line has exploded in popularity, creating substantial demand for and interest in Squishmallows, and generating enormous goodwill in the Original Squishmallows Trade Dress in the United States and around the world. In fact, Kellytoy’s Original Squishmallows line is sold through hundreds of retailers including some of the largest retailers in the country, including, approximately 1,000 Costco stores, 5,500 Wal-Mart stores, 8,500 Walgreens stores, 6,200 CVS stores, 4,000 Kroger supermarkets and Fred Meyer stores, 1,800 Target stores, 700 Justice stores, 900 Party City stores, amongst other outfits such as Dave & Busters, Justice, Hallmark stores, Albertson’s, Knotts Berry Farms and numerous others.

51. Furthermore, during several summer 2019 grand openings for Costco, the highly coveted 24 inch Original Squishmallows plush sold out within two days, exceeding store expectations and projected demand.

52. Since the summer of 2017, Kellytoy has shipped approximately a whopping 55 million (55,000,000) units of its Original Squishmallows line and there is no indication that sales will be slowing down anytime soon. Kellytoy’s Squishmallows products embodying the Trade

Dress have yielded tens of millions of dollars of sales in the U.S. over the past year.

53. Nor has the pace of sales of Kellytoy’s Original Squishmallows line of branded toys slowed. To the contrary, sales of the Original Squishmallows line of plush have been steadily increasing and there is no indication of their popularity waning any time soon. These goods have, in fact, become so popular among, sought after by, and recognizable as a brand by the public that some members of the public have been selling unauthorized merchandise, such as T-shirts and jewelry, bearing the images of some of Kellytoy’s most popular Original Squishmallows branded toys. Few plush lines can boast having third parties attempt to “merchandise” its copyrighted designs and goods generally bearing its trademark – something typically reserved for Disney, Looney Tunes, and the like. But while Kellytoy has since put a stop to these unauthorized uses, it has preserved exemplars of some such infringements by three different infringers, as depicted below:





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puzzles, novelty, publishing and magazines, food and beverage, and mobile gaming. (*See, e.g., Exhibit 7* hereto.)

55. Moreover, recognizing the fame and proprietary nature of the Squishmallows Trade Dress and its recognition by consumers in the marketplace, famous brands such as Disney, Lucasfilm, among others, have licensed their famous characters (including Mickey Mouse, Winnie the Pooh, Baby Yoda) to Kellytoy Holdings to be adapted to the Squishmallows Trade Dress. The famous characters include the distinct features of the Squishmallows Trade Dress.

56. As a result of the extensive efforts to promote, advertise and sell the products embodying the Original Squishmallows Trade Dress and its deliberate efforts to specifically publicize the fact that the Squishmallows are the “Original” and that the “shape, look, feel, and texture of the Squishmallows branded plush toys constitute Kelly Toys Holdings, LLC proprietary trade dress,” consumers have come to associate the Original Squishmallows Trade Dress with a designation of source and the products are inherently distinctive and/or have acquired secondary meaning.

57. All of which is to reiterate that due to the Original Squishmallows line’s massive success and popularity, consumers have come to associate Kellytoy’s high-quality Original Squishmallows line of plush toys with the Original Squishmallows Trade Dress and, conversely, have come to recognize the Original Squishmallows Trade Dress as a designation of source. But that success has come at a price – the popularity of Kellytoy’s Original Squishmallows line of branded goods has attracted many imitators, such as Defendants, all of whom are attempting to benefit from Kellytoy’s hard earned goodwill, and to do so illegally. In fact, Kellytoy has pursued numerous third-party infringers who have co-opted the Original Squishmallows Trade Dress and succeeded in stemming such infringements. Defendants, however, are uniquely positioned in the marketplace – through their massive marketing and distribution network – to

capitalize upon Kellytoy's Original Trade Dress, as discussed in greater detail below.

Defendants' Unlawful Conduct

58. At the outset, none of the defendants to this action is licensed or otherwise authorized by Kellytoy to market or distribute products bearing or embodying Kellytoy's PUFFY Mark or Kellytoy's Original Squishmallows Trade Dress. Ty is a direct competitor of Kellytoy in the plush toy market.

59. Ty has made a career out of copying the original designs of others and using its large market share to usurp the goodwill of its competitors. Ty is a serial copier of the original designs of others.

60. During the week of the Atlanta International Gift & Home Furnishings Market tradeshow (the "Atlanta Gift Show"), Kellytoy learned that, in spite of Kellytoy's prior use and registration of the PUFFY Mark, Ty had a pending United States trademark application, based on intent to use, for the trademark TY PUFFIES. During that same show, Kellytoy learned that Ty was offering for sale at that same tradeshow goods that embody the Original Squishmallows Trade Dress.

61. Consequently, by letter dated January 15, 2020, Kellytoy wrote directly to defendant Ty demanding that it cease-and-desist from using Kellytoy's PUFFIES trademark and copying Kellytoy's Original Squishmallows Trade Dress. Ty responded by denying its wrongful conduct and essentially stating its intention to continue to infringe Kellytoy's proprietary rights by continuing to offer the Infringing Plush (defined below) for sale, including at the upcoming New York Toy Fair – the biggest toy tradeshow in the country, if not the world.

62. Kellytoy is informed and believes that sometime in late-2019/early-2020, and notably well after Kellytoy USA established its reputation in its PUFFY Mark and Kellytoy Worldwide established its reputation in its Original Squishmallows Trade Dress – and after the

Mark and Trade Dress acquired distinctiveness in the marketplace – Defendant Ty began offering for sale various plush toy lines bearing a trademark and trade dress that are substantially and confusingly similar to Kellytoy’s PUFFY Mark and Original Squishmallows Trade Dress.

63. Specifically, Kellytoy is informed and believes that, at the Atlanta International Gift & Home Furnishings Market tradeshow (the “Atlanta Gift Show”), Ty used the PUFFIES trademark in connection with its plush toys (hereinafter collectively referred to as the “Infringing Puffies”) that bears close similarity, in sight, sound, and meaning with Kellytoy’s PUFFY Mark and, as set forth below:



64. Making matters even worse, at the same tradeshow, Ty displayed and marketed plush toys under the moniker “Squish-a-Boos” bearing the Original Squishmallows Trade Dress (hereinafter collectively referred to as the “Infringing Squish Plush”) – plush toys that so closely resemble the unique “look and feel” of the Original Squishmallows Trade Dress that manifest

customer confusion was plainly intended and is certain to occur. Photographs of the Infringing Squish Plush are collectively attached hereto as **Exhibit 8**.

65. Defendants' Infringing Puffies and Infringing Squish Plush shall hereinafter be referred to collectively as the "Infringing Plush."

66. Kellytoy is specifically informed and believes, for example, that Defendants manufactured in, and imported from, China the Infringing Plush into the United States for the purpose of having the Infringing Plush enter interstate commerce and/or to be transported or used in interstate commerce through the same channels of trade through which Kellytoy sells its PUFFY branded plush and its Original Squishmallows line. Indeed, both Kellytoy and Ty sell plush toys to many of the same retailers, such as Claire's, Hallmark Stores, Five Below, Learning Express, Party City, Walgreens, Fred Meyer, Kroger, and CVS.

67. In fact, Kellytoy currently sells its authentic SQUISHMALLOWS branded plush to Claire's, Hallmark Stores, Five Below, Learning Express, Party City, Walgreens, Fred Meyer, Kroger, and CVS and expects that Ty has sold or will make attempts to sell to its copies of Kellytoy's Original Squishmallows at prices lower than Kellytoy sells its authentic Original Squishmallows.

68. Such unauthorized activities are clearly intended to draw on the goodwill Kellytoy has garnered in its PUFFY Mark and its Original Squishmallows Trade Dress, and to compete unfairly and illegally for Kellytoy's customers through trademark confusion, trade dress confusion, and predatory tactics.

69. Kellytoy is informed and believes, for example, that Ty has been offering to sell the Infringing Squishy Plush to customers at prices that are lower than the prices charged by Kellytoy for its authentic Original Squishmallows line of branded plush. Kellytoy is further informed and believes that Ty is able to undercut Kellytoy's sales prices because, rather than

investing in creating its own designs and identity, Ty has instead copied and infringed Kellytoy's proprietary Original Squishmallows Trade Dress and otherwise because its Infringing Squishy Plush are of inferior quality as compared to Kellytoy's Original Squishmallows branded plush.

70. Kellytoy is additionally informed and further believes that Defendants, without Kellytoy's consent or permission, advertise, promote, and display, and sell and distribute, the Infringing Plush in United States commerce and that Defendants' Infringing Plush are marketed and sold in the same channels of trade as Kellytoy's authentic plush toys.

71. The Defendants' deliberate misconduct in copying, advertising, offering for sale, sale and otherwise using the PUFFY Mark trademark and the Original Squishmallows Trade Dress in connection with the Infringing Plush – including by copying wholesale the shape and look of the Original Squishmallows Trade Dress – constitute trademark infringement, trade dress infringement, and false designation of origin regarding sponsorship of those plush toys and falsely represent to the public that the Infringing Plush originate from a common source with Kellytoy's authentic PUFFY branded and Original Squishmallows plush toys, and/or that Defendants' Infringing Plush have been sponsored, approved or licensed by Kellytoy, or are in some way affiliated or connected with Kellytoy.

72. These activities are likely to confuse, mislead, and deceive Defendants' customers, purchasers, and members of the public as to the origin of Defendants' toys bearing the PUFFIES trademark and the Original Squishmallows Trade Dress, or to cause such persons to believe that Defendants' Infringing Plush and/or Defendants have been sponsored, approved, authorized, or licensed by Kellytoy or in some way affiliated or connected with Kellytoy, all in violation of, among other laws, 15 U.S.C. §§ 1114 and 1125(a).

73. Kellytoy is informed and believes that the Defendants' activities were conducted willfully with full knowledge of the falsity of such designations of origin and false descriptions

or representations, with the intent to trade on the enormous goodwill Kellytoy has earned in its PUFFY Mark and its Original Squishmallows Trade Dress, and with the intent to cause confusion, and to mislead and deceive the purchasing public into believing that the products Defendants offer for sale and sell are directly sponsored by, authorized, by, associated with, or originate from Kellytoy or, at the very least, from a common source as Kellytoy's PUFFY and Original Squishmallows lines of branded plush toys.

74. Defendants, by their unauthorized infringement, copying and use of Kellytoy's PUFFY Mark and Original Squishmallows Trade Dress, have engaged and will engage in acts of trademark infringement, unfair competition, unlawful appropriation, unjust enrichment, wrongful deception of the purchasing public, and unlawful trading on Kellytoy's good will and the public acceptance of Kellytoy's original works. Defendants' activities have damaged and will continue to damage the reputation, business and good will of Kellytoy nationally and in this judicial district.

75. Upon information and belief, unless enjoined by the Court, Defendants will continue and further escalate their infringing activities.

76. Kellytoy has no adequate remedy at law. Thus, these activities of Defendants have caused and, if not enjoined, will continue to cause irreparable, immediate and impending harm and damage to Kellytoy's business, and to the business, business reputation and good will of Kellytoy.

FIRST CAUSE OF ACTION

(Federal Trademark Infringement – 15 U.S.C. § 1114(1)-(2))

(All Defendants)

77. Kellytoy repeats, realleges and incorporates each of the allegations made above as if fully set forth herein.

78. Kellytoy owns and/or has a protectable interest in the registered PUFFY Mark.

79. As the owner of all rights, title and interest, and/or an owner of an enforceable beneficial interest, in and to the PUFFY Mark, Kellytoy has standing to maintain in action for trademark infringement under the Lanham Act, including 15 U.S.C. §1114.

80. Without Kellytoy's authorization or consent, and having knowledge of Kellytoy's prior rights in the PUFFY Mark, Defendants have designed, manufactured, distributed, advertised, offered for sale and/or sold highly similar plush toys bearing the highly similar trademark, PUFFIES, to the consuming public in direct competition with Kellytoy, in or affecting interstate commerce.

81. Defendants have caused actual confusion, a likelihood of confusion, mistake and deception as to the source of origin, sponsorship, authorization, association, or affiliation of Defendants' goods, such that the public has been confused and there is a likelihood that the public will be confused into believing that the products Defendants promote, distribute, and sell are directly sponsored by, associated with, or originate from the same source as Kellytoy's plush toys sold in connection with the PUFFY Mark.

82. Defendants' use of the PUFFY Mark violates sections 32(1) and (2) of the Lanham Act, 15 U.S.C. § 1114(1)-(2), because it constitutes unauthorized, willful and/or deliberate use in commerce of reproductions, counterfeits, copies, and/or colorable imitations of Kellytoy's federally-registered mark in connection with the sale, offering for sale, distribution, and advertising of products and services in a manner likely to cause confusion, mistake, and deception.

83. On information and belief, Defendants' acts have been willful and deliberate.

84. As a direct and proximate result of Defendants' unlawful conduct, Defendants have misappropriated Kellytoy's rights in the PUFFY Mark, as well as the goodwill associated

therewith, and have diverted sales and profits from Kellytoy to Defendants. Thus, as a direct and proximate result of Defendants' acts of willful infringement, Kellytoy has suffered damage to its valuable brand and reputation, and other damages in an amount to be proven at trial, including Defendants' profits and Kellytoy's lost profits.

85. Defendants' actions described above have caused and will continue to cause irreparable damage to Kellytoy, unless Defendants are restrained by this Court. Kellytoy has no adequate remedy at law with regard to Defendants' infringing conduct. Accordingly, Kellytoy is entitled to a preliminary and permanent injunction, pursuant to 15 U.S.C. § 1116, restraining and enjoining Defendants' and their agents, servants, and employees, and all persons acting thereunder, in concert with, or on their behalf, from using Kellytoy's PUFFY Mark, or any colorable imitation or variation thereof, including PUFFIES, in connection with the sale and/or marketing of any products.

86. Defendants' aforesaid acts are exceptional within the meaning of 15 U.S.C. § 1117.

SECOND CAUSE OF ACTION

(Trademark Infringement and False Designation of Origin and False Description -- 15 U.S.C. §1125) (All Defendants)

87. Kellytoy repeats, realleges and incorporates each and every allegation made above as if fully set forth herein.

88. Kellytoy owns and/or has a protectable interest in the registered PUFFY Mark. As the owner of all rights, title and interest, and/or an owner of an enforceable beneficial interest, in and to the PUFFY Mark, Kellytoy has standing to maintain an action for false designation of origin and unfair competition under the Lanham Act, including 15 U.S.C. § 1125.

89. The PUFFY Mark is highly distinctive and has each become associated in the public mind with plush toy products of the highest quality and reputation finding their origin in a single source, Kellytoy.

90. Kellytoy owns all right, title and interest and/or is an authorized user thereof in and to the PUFFY Mark.

91. Without Kellytoy's authorization or consent, and having knowledge of Kellytoy's prior rights in the PUFFY Mark, Defendants have imported, distributed, advertised, offered for sale and sold, and/or will continue to import, distribute, advertise, offer for sale, highly similar plush toys bearing the highly similar trademark, PUFFIES, to the consuming public in direct competition with Kellytoy, in or affecting interstate commerce.

92. Defendants' PUFFIES trademark is confusingly similar to the PUFFY Mark. Defendants' use of the PUFFY Mark has caused and, unless enjoined by this Court, will continue to cause a likelihood of confusion and deception of members of the public and, additionally, injury to Kellytoy's goodwill and reputation as symbolized by the PUFFY Mark.

93. Defendants' use and further threatened uses of the PUFFY Mark thus constitutes trademark infringement, false designation of origin, and/or unfair competition in violation of 15 U.S.C. § 1125(a).

94. As a direct and proximate result of Defendants' unlawful conduct, Defendants have misappropriated Kellytoy's rights in the PUFFY Mark, as well as the goodwill associated therewith, and have diverted sales and profits from Kellytoy to Defendants. Thus, as a direct and proximate result of Defendants' acts of willful infringement, Kellytoy has suffered and/or will suffer damage to its valuable brand and reputation, and other damages in an amount to be proven at trial, including Defendants' profits and Kellytoy's lost profits.

95. Defendants' actions described above will cause, have caused, and will continue to

cause irreparable damage to Kellytoy, unless Defendants are restrained by this Court. Kellytoy has no adequate remedy at law with regard to Defendants' infringing conduct. Accordingly, Kellytoy is entitled to a preliminary and permanent injunction, pursuant to 15 U.S.C. § 1116, restraining and enjoining Defendants' and their agents, servants, and employees, and all persons acting thereunder, in concert with, or on their behalf, both from using the PUFFY Mark, or any colorable imitations or variations thereof, in connection with the sale and/or marketing of any products.

96. Defendants' aforesaid acts are exceptional within the meaning of 15 U.S.C. § 1117.

THIRD CAUSE OF ACTION

(Trademark Infringement, Trade Dress Infringement, False Designation of Origin and False Description -- 15 U.S.C. §1125)

(All Defendants)

97. Kellytoy repeats, realleges and incorporates each and every allegation made above as if fully set forth herein.

98. As the owner of all rights, title and interest, and/or an owner of an enforceable beneficial interest, in and to the Original Squishmallows Trade Dress, Kellytoy has standing to maintain an action for trade dress infringement under the Lanham Act including, 15 U.S.C. § 1125.

99. The Original Squishmallows Trade Dress is non-functional and highly distinctive and has each become associated in the public mind with plush toy products of the highest quality and reputation finding their origin in a single source, Kellytoy.

100. Original The Squishmallows Trade Dress has acquired secondary meaning based upon, at least in part to, the amount and manner of advertising of products embodying the

Squishmallows Trade Dress, the volume of sales, as well as, the length and manner of use of the products.

101. The Original Squishmallows Trade Dress – comprised of a proprietary combination of aesthetic and stylized plush toy features, including the shape, color, color combinations, texture and graphics – is non-functional and highly distinctive, and has become associated in the minds of the consuming public with plush toy products of the highest quality and reputation finding their origin in a single source. Indeed, the Original Squishmallows Trade Dress when viewed as a whole – comprised of a combination of aesthetic and stylized plush toy features, including the shape, color, color combinations, texture and graphics – presents a non-functional look and feel that is uniquely associated with the Original Squishmallows line. The non-functional nature of these features are evidenced and clear, in part, by reference to the following: (1) the Original Squishmallows Trade Dress is not the subject of an expired or unexpired utility patent; (2) the unique combination of stylistic elements yielding no utilitarian advantage; (3) the innumerable alternative stylistic plush toy features available to and used competitors, including, (i) countless alternative plush toy shapes (e.g., traditional animal designs as opposed to Kellytoy’s whimsical, abstract renditions of animals, and rectangular shaped plush toys, spherical shaped plush toys, cube shaped plush toys, realistic plush toy animals, etc.), (ii) numerous alternative means to depict facial features (e.g., plastic eyes, traditional plush toy facial features, etc.), (iii) myriad alternative shell materials (e.g., terrycloth, long pile plush, velboa, satin, etc.), and (iv) countless alternative stuffing materials available (e.g., beans, pvc pellets, cotton, hard foam, etc.); furthermore, when the features of the Original Squishmallows Trade Dress are viewed collectively – as the law provides in assessing trade dress – it is clear that there are innumerable alternative plush designs actually used and available to competitors in the marketplace; (4) Kellytoy not touting or marketing utilitarian advantages of its Original Squishmallows Trade Dress, and (5) the Original Squishmallows Trade Dress not resulting from a comparatively simple or inexpensive method of manufacture vis-à-vis other plush toys, e.g., the egg/bell shape provides no manufacturing cost savings (other shapes such as squares, circles, triangles are equally, or less, expensive to

manufacture) and there are numerous less expensive shell materials (e.g., Tricot, EF Velboa and Velboa), stuffings (e.g., regular polyester stuffing and 3D light weight stuffing), and ways to depict the facial features other than embroidery (e.g., printing and sublimation printing). In fact, Defendants sell numerous lines of plush toys that do not co-opt the Original Squishmallows Trade Dress, such as its Beanie-Boos line of plush toys. Moreover, protection of the Original Squishmallows Trade Dress as a trademark would not impose a non-reputation-related competitive disadvantage, as there are many ways to design an equally pleasing plush toy without copying the Original Squishmallows Trade Dress. Regardless, however, the product features of the Original Squishmallows Trade Dress do not serve an aesthetic function wholly independent of any source identifying function. To the contrary, the Original Squishmallows Trade Dress was specifically designed to distinguish – and has succeeded in distinguishing – the source of products embodying the Original Squishmallows Trade Dress from the source of other toys.

102. Without Kellytoy’s authorization or consent, and having knowledge of Kellytoy’s prior rights in the Original Squishmallows Trade Dress, Defendants have designed, manufactured, imported, distributed, advertised, offered for sale and/or sold and/or will continue to import, distribute, advertise, offer for sale, and sell replicas of the Original Squishmallows Trade Dress to the consuming public in direct competition with Kellytoy, in or affecting interstate commerce.

103. The Infringing Squishy Plush designs are, each alone and together, confusingly similar to the Original Squishmallows Trade Dress. Defendants’ use of the Original Squishmallows Trade Dress has caused and, unless enjoined by this Court, will continue to cause a likelihood of confusion and deception of members of the public and, additionally, injury to Kellytoy’s goodwill and reputation as symbolized by the Original Squishmallows Trade Dress.

104. Defendants’ use and further threatened uses of the Original Squishmallows Trade Dress thus constitute trademark infringement, trade dress infringement, false designation of

origin, and/or unfair competition in violation of 15 U.S.C. § 1125(a).

105. As further evidence of Ty's intent to trade upon Kellytoy's goodwill in the Original Squishmallows Trade Dress, in order to ensure consumer confusion, Defendants adopted a mark – for use in connection with the Infringing Squishy Plush, namely Squish-A-Boos – that includes the same “squish” prefix and that has same number of syllables and sound as the SQUISHMALLOW Mark.

106. As a direct and proximate result of Defendants' unlawful conduct, Defendants have misappropriated Kellytoy's rights in the Original Squishmallows Trade Dress, as well as the goodwill associated therewith, and have diverted sales and profits from Kellytoy to Defendants. Thus, as a direct and proximate result of Defendants' acts of willful infringement, Kellytoy has suffered and/or will suffer damage to its valuable brand and reputation, and other damages in an amount to be proven at trial, including Defendants' profits and Kellytoy's lost profits.

107. Defendants' actions described above will cause, have caused, and will continue to cause irreparable damage to Kellytoy, unless Defendants are restrained by this Court. Kellytoy has no adequate remedy at law with regard to Defendants' infringing conduct. Accordingly, Kellytoy is entitled to a preliminary and permanent injunction, pursuant to 15 U.S.C. § 1116, restraining and enjoining Defendants' and their agents, servants, and employees, and all persons acting thereunder, in concert with, or on their behalf, both from using the Original Squishmallows Trade Dress, or any colorable imitations or variations thereof, in connection with the sale and/or marketing of any products.

108. Defendants' aforesaid acts are exceptional within the meaning of 15 U.S.C. § 1117.

FOURTH CAUSE OF ACTION

(Common Law Trade Dress Infringement)
(All Defendants)

109. Kellytoy repeats, realleges and incorporates each and every allegation made above as if fully set forth herein.

110. This claim arises under the common law of this State relating to trade dress infringement. This Court has jurisdiction over the subject matter of this claim pursuant to the provisions of 28 U.S.C. § 1338(b), this being a claim of unfair competition joined with a substantial and related claim under the Trademark Laws of the United States, and under 28 U.S.C. § 1367.

111. As the owner of all rights, title and interest, and/or an owner of an enforceable beneficial interest, in and to the Original Squishmallows Trade Dress, Kellytoy has standing to maintain an action for trade dress infringement under the common law. In particular, because of their enormous sales and publicity, Kellytoy has acquired common law trade dress rights in and to the Original Squishmallows Trade Dress. Kellytoy's common law trade dress is distinctive, and furthermore, have acquired secondary meaning.

112. The infringing products imported, advertised, distributed, offered for sale and sold by Defendants incorporate matter constituting replicas and imitations of Kellytoy's common law trade dress. Such unauthorized use by Defendants of Kellytoy's common law trade dress constitutes common law trade dress infringement and unfair competition, and is likely to cause confusion and mistake in the minds of the trade and the purchasing public as to the source of the products and to cause purchasers to believe such products are authentic products of Kellytoy when, in fact, they are not.

115. Kellytoy is informed and believes, and thereupon alleges, that Defendants committed the above alleged acts in conscious disregard of Kellytoy's rights, and Kellytoy is therefore entitled to exemplary and punitive damages pursuant to the common law of the State of Illinois.

FIFTH CAUSE OF ACTION

(All Defendants)

118. Defendants have knowingly and willfully engaged in deceptive trade practices within the meaning of the Illinois Uniform Deceptive Trade Practices Act, 815 ILCS Sections 510/1 *et seq.* by causing likelihood of confusion misleading as to the source, origin or

sponsorship of the parties' respective products, causing likelihood of confusion or of misunderstanding as to the affiliation, connection or association of Defendants with the Original Squishmallows Trade Dress and using deceptive representations or designations of origin in connection with Defendants' products.

119. The foregoing acts of Defendants constitute willful, deceptive acts and practices in the conduct of business, trade and/or commerce, in violation of Illinois Uniform Deceptive Trade Practices Act, 815 ILCS Sections 510/1 *et seq.*, for which Kellytoy is entitled to injunctive relief, actual damages, treble damages, punitive damages, attorneys' fees, and costs. The foregoing acts of Defendants will create a likelihood of injury to the public image and business reputation of Kellytoy, in that the public will likely associate Defendants' goods with Kellytoy and/or Kellytoy's goods, and cause the dilution of the distinctive quality of Kellytoy's Original Squishmallows Trade Dress, and Kellytoy's common law trade dress in violation of the Illinois Uniform Deceptive Trade Practices Act, 815 ILCS §§ 510/1 *et seq.*, for which Kellytoy is entitled to injunctive relief.

120. The foregoing acts of Defendants were calculated and designed intentionally to mislead and deceive the public and trade as to the identity of Defendants or as to the connection of Defendants with Kellytoy, in violation of 815 ILCS §§ 510/1 *et seq.*, for which Kellytoy is entitled to injunctive relief.

121. The unauthorized use by Defendants of the Original Squishmallows Trade Dress is causing and is likely to cause substantial injury to the public and to Kellytoy.

SIXTH CAUSE OF ACTION

(Illinois Common Law Unfair Competition)

(All Defendants)

122. Kellytoy repeats, realleges and incorporates each and every allegation made above

as if fully set forth herein.

123. Defendants' acts constitute common law trade dress infringement in violation of state common law, including the common law of the State of Illinois. Such acts of common law trade dress infringement constitute unfair competition within the meaning of the common law, including the common law of the State of Illinois.

124. Upon information and belief, Defendants' conduct was and continues to be willful, intentional, and in bad faith.

125. Defendants' acts have caused, and continue to cause, irreparable harm to Kellytoy, and Kellytoy is left with no adequate remedy at law such that the damage to Kellytoy will continue unless and until enjoined by the Court.

SEVENTH CAUSE OF ACTION

(Common Law Trademark Infringement)

(All Defendants)

126. Kellytoy repeats, realleges and incorporates each and every allegation made above as if full set forth herein.

127. This claim arises under the common law of this State relating to trademark infringement. This Court has jurisdiction over the subject matter of this claim pursuant to the provisions of 28 U.S.C. § 1338(b), this being a claim of unfair competition joined with a substantial and related claim under the Trademark Laws of the United States, and under 28 U.S.C. § 1367.

128. As the owner of all rights, title and interest, and/or an owner of an enforceable beneficial interest, in and to the PUFFY Mark , Kellytoy has standing to maintain an action for common law trademark infringement. Indeed, Kellytoy has undertaken extensive manufacture and sale of products bearing such trademark, as set forth in the preceding paragraphs of this

Complaint. In particular, because of their enormous sales and publicity, Kellytoy has acquired common law trademark rights in and to the PUFFY Mark. Kellytoy's common law trademark is distinctive, and furthermore, has acquired secondary meaning.

129. The infringing products imported, advertised, distributed, offered for sale and sold by Defendants incorporate matter constituting replicas and imitations of Kellytoy's common law trademark. Such unauthorized use by Defendants of Kellytoy's common law trademark constitutes common law trademark infringement and unfair competition, and is likely to cause confusion and mistake in the minds of the trade and the purchasing public as to the source of the products and to cause purchasers to believe such products are authentic products of Kellytoy when, in fact, they are not.

130. Upon information and belief, Defendants have willfully and intentionally misappropriated one or more aspects of Kellytoy's common law trademark with the intent of causing confusion, mistake, and deception as to the source of its goods and with the intent to palm off their goods as those of Kellytoy and to place others in the position to palm off its goods as those of Kellytoy, and as such, Defendants have committed trademark infringement and unfair competition under the common law.

131. By such actions in infringing' Kellytoy's common law trademark, Defendants are improperly trading upon the enviable reputation and goodwill of Kellytoy and impairing Kellytoy's valuable rights in and to such trademark.

132. Kellytoy is informed and believes, and thereupon alleges, that Defendants committed the above alleged acts in conscious disregard of Kellytoy's rights, and Kellytoy is therefore entitled to exemplary and punitive damages pursuant to the common law of the State of Illinois.

133. Kellytoy has no adequate remedy at law. The conduct of Defendants has caused and, if not enjoined, will continue to cause, irreparable damage to Kellytoy's rights in and to its trademark, and to Kellytoy's business, reputation, and goodwill.

EIGHTH CAUSE OF ACTION

(Deceptive Trade Practices Pursuant to 815 ILCS §§ 510/1, *et seq.*)

(All Defendants)

134. Kellytoy repeats, realleges and incorporates each and every allegation made above as if set forth herein.

135. Defendants have knowingly and willfully engaged in deceptive trade practices within the meaning of the Illinois Uniform Deceptive Trade Practices Act, 815 ILCS Sections 510/1 *et seq.* by causing likelihood of confusion misleading as to the source, origin or sponsorship of the parties' respective products, causing likelihood of confusion or of misunderstanding as to the affiliation, connection or association of Defendants with the PUFFY Mark and using deceptive representations or designations of origin in connection with Defendants' products.

136. The foregoing acts of Defendants constitute willful, deceptive acts and practices in the conduct of business, trade and/or commerce, in violation of Illinois Uniform Deceptive Trade Practices Act, 815 ILCS Sections 510/1 *et seq.*, for which Kellytoy is entitled to injunctive relief, actual damages, treble damages, punitive damages, attorneys' fees, and costs. The foregoing acts of Defendants will create a likelihood of injury to the public image and business reputation of Kellytoy, in that the public will likely associate Defendants' goods with Kellytoy and/or Kellytoy's goods, and cause the dilution of the distinctive quality of Kellytoy's PUFFY Mark in violation of the Illinois Uniform Deceptive Trade Practices Act, 815 ILCS §§ 510/1 *et seq.*, for which Kellytoy is entitled to injunctive relief.

137. The foregoing acts of Defendants were calculated and designed intentionally to mislead and deceive the public and trade as to the identity of Defendants or as to the connection of Defendants with Kellytoy, in violation of 815 ILCS §§ 510/1 *et seq.*, for which Kellytoy is entitled to injunctive relief.

138. The unauthorized use by Defendants of the PUFFY Mark is causing and is likely to cause substantial injury to the public and to Kellytoy.

NINTH CAUSE OF ACTION

(Illinois Common Law Unfair Competition)

(All Defendants)

139. Kellytoy repeats, realleges and incorporates each and every allegation made above as if fully set forth herein.

140. Defendants' acts constitute common law trademark infringement in violation of state common law, including the common law of the State of Illinois. Such acts of common law trademark infringement constitute unfair competition within the meaning of the common law, including the common law of the State of Illinois.

141. Upon information and belief, Defendants' conduct was and continues to be willful, intentional, and in bad faith.

142. Defendants' acts have caused, and continue to cause, irreparable harm to Kellytoy, and Kellytoy is left with no adequate remedy at law such that the damage to Kellytoy will continue unless and until enjoined by the Court.

JURY DEMAND

Kellytoy demands a trial by jury on all issues.

PRAYER FOR RELIEF

WHEREFORE, Kellytoy prays for judgment against Defendants as follows:

1. That Defendants, their officers, members, directors, agents, servants, employees, successors, licensees, representatives, successors, assigns, and all persons acting in concert or participation with them, be preliminarily and permanently enjoined and restrained from:

- (i) Manufacturing, importing, distributing, advertising, offering to sell or selling the Infringing Plush or any colorable imitations of the PUFFY Mark or the Original Squishmallows Trade Dress;
- (ii) Using the Original Squishmallows Trade Dress or any confusingly similar trade dress in connection with plush or other toys;
- (iii) Using the PUFFY Mark or any confusingly similar mark, including without limitation PUFFIES, in connection with plush toys or other goods;
- (iii) Using the Original Squishmallows Trade Dress, or any confusingly similar mark, in connection with the advertisement, offer to sell or sale of any toy products;
- (iv) Using any false designation of origin, or representing or suggesting directly or by implication that Defendants, or any brands or other sources identifiers used by Defendants, or their toys, are affiliated with, associated with, authorized by, or otherwise connected to Kellytoy, or that Defendants are authorized by Kellytoy to use the PUFFY Mark or the Original Squishmallows Trade Dress;
- (v) Infringing or contributing to the infringement of any of Kellytoy's trademarks or trade names, including without limitation the PUFFY Mark and/or Original Squishmallows Trade Dress, or otherwise engaging in unfair competition with Kellytoy in any manner or engaging in any conduct

tending to falsely represent or likely to confuse, mislead or deceive suppliers, purchasers, or any member of the public into thinking that Defendants or any of their products are affiliated with Kellytoy or that Kellytoy has otherwise sponsored, approved, or licensed any products or services of Defendants;

- (vi) Engaging in any other activity constituting unfair competition with Kellytoy, or constituting infringement of the PUFFY Mark or the Original Squishmallows Trade Dress; and
- (vii) Assisting, aiding, or abetting any other person or business entity in engaging or performing any of the activities referred to in subparagraphs (i) through (vi) above, or effecting any assignments or transfers, forming new entities or associations, or utilizing any other device for the purpose of circumventing or otherwise avoiding the prohibitions set forth in subparagraphs (i) through (vi) above;

2. That Defendants be directed to file with the Court and serve on Kellytoy, within thirty (30) days after entry of a final injunction, a report in writing under oath setting forth in detail the manner and form in which Defendants have complied with the injunction;

3. That Kellytoy has superior rights to exclusive use in the PUFFY Mark and that Kellytoy has superior rights to exclusive use in the Original Squishmallows Trade Dress in connection with toys and/or pillows vis-à-vis Defendants;

4. That Defendants shall not in the future file or maintain an application for registration or registration of any mark that includes “puffy” or “puffies” or any designation(s) confusingly similar thereto with the United States Patent and Trademark Office or any other governmental or state authority;

5. That the Court direct any third parties providing services to Defendants in connection with any infringing and/or enjoined conduct, including social media platforms (*e.g.*, Instagram, Facebook, Twitter), online marketplaces (*e.g.*, Alibaba, eBay, Etsy, AliExpress, Amazon, Taobao), online payment providers, including credit card companies (*e.g.*, PayPal, Visa) and other service providers (*e.g.*, Google, GoDaddy, LiveChat, Shopify) to cease providing services to Defendants in connection with the offer for sale and sale of the Infringing Plush or any other products using or embodying the PUFFY Mark, the Original Squishmallows Trade Dress, or any design, word or designation confusingly similar to the PUFFY Mark and/or the Original Squishmallows Trade Dress, including without limitation, PUFFIES, or any alternate spellings thereof;

6. That Defendants be required to pay Kellytoy such damages as it has sustained as a consequence of Defendants' infringement of the of each of the Original Squishmallows Trade Dress and the PUFFY Mark and trebling of those damages under 15 U.S.C. § 1117;

7. Adjudge that each of the Defendants, by their unauthorized use of Kellytoy's PUFFY Mark and the Original Squishmallows Trade Dress for plush toys, and such other acts as it may have undertaken relating to the PUFFY Mark and/or Original Squishmallows Trade Dress, have violated Kellytoy's rights under 15 U.S.C. §§ 1114, 1125(a) and 1125(d), under Illinois Uniform Deceptive Trade Practices Act, 815 ILCS Sections 510/1 *et seq.*, Illinois state law, and under common law, and that they have done so willfully and for the purpose of violating Kellytoy's rights and damaging Kellytoy's goodwill and reputation in the PUFFY Mark and the Original Squishmallows Trade Dress;

8. Direct Defendants to provide Kellytoy with an identification in writing of any and all entities that are presently using the PUFFY Mark or the Original Squishmallows Trade Dress

in the United States on Defendants' behalf and inform them that they must immediately cease such use;

9. Direct Defendants to immediately recall any and all merchandise previously provided to any United States entity bearing or using the PUFFY Mark (including, e.g., the PUFFYIES mark), or the Original Squishmallows Trade Dress;

10. Enter an order, pursuant to 15 U.S.C § 1118, directing Defendants to deliver for destruction all products, brochures, marketing materials, decals, stickers, signs, prints, packages, receptacles, wrappers, boxes, and advertisements in their possession or under their control, bearing any unauthorized copy of any of the PUFFY Mark or the Original Squishmallows Trade Dress, or any simulation, reproduction, counterfeit, copy, confusingly similar likeness, or colorable imitation thereof, including without limitation the PUFFIES designation, and all plates, molds, matrices, programs and other means of making same;

11. That each Defendant provide Kellytoy in writing with the following information relating to Defendants' goods marketed, advertised, offered for sale, or sold under either or both of the PUFFY Mark and/or the Original Squishmallows Trade Dress:

- (i) the name, address and telephone number of each and every United States entity to whom Defendants have made available or otherwise provided any such products; and
- (ii) the total number of units distributed and sold;
- (iii) the total number of units remaining in inventory; and
- (iv) a full accounting as to the precise dollar amount of such products made available or provided and the profits recognized by Defendants in connection with such actions;

12. Direct Defendants to pay the costs of corrective advertising;

13. Direct Defendants to pay Plaintiff's attorneys' fees and costs incurred in initiating and prosecuting this action;

14. Direct Defendants to pay punitive damages and exemplary damages according to proof;

15. That Kellytoy recover its actual damages, Kellytoy's lost profits, and Defendant's profits arising from Defendants' conduct complained-of herein;

16. That the Court award enhanced profits and treble damages;

17. That Kellytoy be awarded interest, including pre-judgment interest, on the foregoing sums;

18. That the Court direct such other actions as the Court may deem just and proper to prevent the public from deriving the mistaken impression that any products or services offered, advertised, or promoted by or on behalf of Defendants are authorized by Kellytoy or related in any way to Kellytoy's products or services;

19. Providing that Defendants' conduct constitutes willful, deceptive acts and practices in the conduct of business, trade and/or commerce, in violation of the Illinois Uniform Deceptive Trade Practices Act, 815 ILCS Sections 510/1 et seq. and common law;

20. Providing that Defendants' conduct will create a likelihood of dilution and injury to Kellytoy's business reputation in violation of the Illinois Uniform Deceptive Trade Practices Act, 815 ILCS Sections 510/1 et seq. and common law;

21. Providing that Defendants used the PUFFY Mark and/or the Original Squishmallows Trade Dress with the intent to cause confusion and to deceive the public in violation of the Illinois Uniform Deceptive Trade Practices Act, 815 ILCS Sections 510/1 et seq. and common law;

22. Providing that Defendants have injured Kellytoy by depriving it of sales of its genuine goods and services, by injuring its business reputation, and by passing off Defendants' goods as Kellytoy's goods and/or created a likelihood of confusion and/or false designation of origin, all in violation of the common law of the Illinois Uniform Deceptive Trade Practices Act, 815 ILCS Sections 510/1 et seq. and common law;

23. Providing that Defendants' willfully misappropriated and used the PUFFY Mark and/or Original Squishmallows Trade Dress and such conduct constitutes misappropriation, unfair competition and unjust enrichment, all in violation of the common law of the Illinois Uniform Deceptive Trade Practices Act, 815 ILCS Sections 510/1 et seq. and common law; and

24. For such other and further relief as the Court may deem just and proper.

DATED: October 21, 2020

Respectfully submitted,

/s/ Dean D. Niro

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DATED: October 21, 2020

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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that the foregoing document was served upon all counsel of record via filing with CM/ECF on October 21, 2020.

/s/ Mark B. Mizrahi

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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case No. 23-9255

KELLY TOYS HOLDINGS, LLC;
JAZWARES, LLC; KELLY
AMUSEMENT HOLDINGS, LLC;
and JAZPLUS, LLC,

Plaintiffs,

vs.

ZURU, LLC,

Defendant.

COMPLAINT FOR:

- 1. Trade Dress Infringement Under the Lanham Act;**
- 2. Common Law Trade Dress Infringement;**
- 3. Copyright Infringement Under the Copyright Act;**
- 4. Common Law Unfair Competition; and**
- 5. California Statutory Unfair Competition.**

DEMAND FOR JURY TRIAL

1 Plaintiffs KELLY TOYS HOLDINGS, LLC, JAZWARES, LLC, KELLY
2 AMUSEMENT HOLDINGS, LLC, and JAZPLUS, LLC (collectively, “Kelly Toys”)
3 bring this action against Defendant ZURU, LLC (“Zuru”) for injunctive relief and
4 damages under the laws of the United States and the State of California, as follows:

5 INTRODUCTION

6 1. Plaintiffs are among the world’s leading manufacturers and distributors
7 of high-quality plush toys and other consumer products. In 2016, their distinctive line
8 of plush toys branded “Squishmallows” was released. Often referred to as just
9 “Squish,” these soft, huggable friends immediately appealed to adults and children
10 alike. Consumers throughout the United States began collecting Squishmallows and
11 even started online communities to track the availability of new Squishmallows as they
12 were released. Celebrities like Lady Gaga and Kim Kardashian have posted their
13 collections of Squishmallows on social media. And major American publications,
14 including *The New York Times*, have profiled the broad popularity of the
15 Squishmallows products worldwide. As one consumer remarked about her
16 Squishmallows plush: “It just brings me happiness and that warm and fuzzy feeling.”¹



27
28 ¹ Taylor Lorenz, *Squishmallows Are Taking Over*, N.Y. Times (March 16, 2021),
<https://www.nytimes.com/2021/03/16/style/squishmallows.html>.

1 2. Squishmallows have become a phenomenon, rapidly experiencing
2 breakaway success and quickly turning into a coveted collectors' item with an avid
3 fanbase. Rather than competing fairly in the marketplace by creating its own unique
4 concepts and product lines, Defendant Zuru, a billion-dollar company, decided that it
5 would be easier to simply copy, imitate, and profit off the popularity and goodwill of
6 Squishmallows, all in the hopes of confusing consumers into buying their products.
7 Zuru is familiar with this business model: it has previously been sued by the LEGO
8 Group for selling toys that are confusingly, strikingly, and substantially similar to the
9 look and feel of LEGO figurines.

10 3. In June 2023, Zuru announced the release of its "Snackles" plush toys.
11 As seen below, the Snackles toys have the *same* distinctive trade dress as the popular
12 Squishmallows, including: shaped fanciful renditions of animals/characters; simplified
13 Asian style Kawaii faces; embroidered facial features; distinctive and non-
14 monochrome coloring; and velvety velour-like textured exterior. And, in marketing
15 Snackles, Zuru likewise urges consumers to, like Squishmallows, "collect" all "12
16 Snackles" and "start building your Snackle family!" And, likely noticing that
17 consumers refer to Squishmallows as Squish, Zuru boasts on product listings that
18 Snackles has the "softest, squishiest plush."

Squishmallows Original Product

Snackles Copycat Product



4. In the marketplace, Zuru has been transparently trying to position its products to trick customers looking for Squishmallows to buy Snackles instead. For example, Snackles products are often found right *next to* Squishmallows products in retail stores. In addition, when consumers search for “Squishmallows” on retail websites like Amazon.com, paid search results identify Snackles instead. Upon information and belief, Zuru negotiates for shelf space right next to Squishmallows in retail outlets and pays website operators to appear in search term results, all in an effort to trick consumers into purchasing Snackles even though they are looking to buy Squishmallows.

1 5. Zuru's efforts have created substantial and actual confusion. For
2 example, consumer reviews on Snackles products indicate that consumers believe that
3 they were buying Squishmallows instead: "My grandkids love Squishmallows. My
4 grandson is going to be so surprised when he sees this devil with the hot sauce." Even
5 Squishmallows fans have noted on message boards that they were confused when they
6 first saw Snackles, commenting: "I saw them in a shop earlier and literally had to check
7 the tag to figure out whether they were squishs. In my defense, they weren't in a box
8 like in the picture, they were on a shelf right next to the squishs." As one
9 Squishmallows fan observed about Snackles: "they're 100% trying to trick ppl like
10 your partner."

11 6. Zuru's actions have already caused significant harm. For example,
12 customer confusion has led to lost potential customers, sales, and market share. Plus,
13 Zuru's bidding on search result positioning has caused Kelly Toys to have to spend
14 more money to buy paid search term results for its *own* "Squishmallows" mark. In
15 short, Kelly Toys is being forced to spend more time and resources to compete with
16 Snackles products that employ Squishmallows' own trade dress and copyrights.

17 7. This is a straightforward case of trade dress and copyright infringement.
18 Kelly Toys Holdings, LLC owns the popular and distinctive trade dress in
19 Squishmallows and Zuru is willfully infringing those trade dress rights. Courts
20 regularly find trade dress infringement in similar cases. *See, e.g., Lanard Toys Ltd. v.*
21 *Novelty, Inc.*, 375 F. App'x 705, 714 (9th Cir. 2010) (affirming jury verdict finding
22 trade dress infringement); *MGA Entm't, Inc. v. Multitoy, Inc.*, No. CV04-2524, 2005
23 WL 8156296, at *3-4 (C.D. Cal. Oct. 11, 2005) (finding that defendant infringed
24 plaintiff toy company's trade dress). Kelly Toys Holdings, LLC also owns copyrights
25 to certain Squishmallows and Zuru is likewise willfully infringing on those copyrights
26 by selling its Snackles products that copy constituent elements of those copyrights.
27 Through this action, Kelly Toys seeks monetary and injunctive relief to stop Zuru's
28

1 latest copycat efforts, put an end to consumer confusion, and vindicate the intellectual
2 property rights in Squishmallows.

3 **THE PARTIES**

4 8. Plaintiff Kelly Toys Holdings, LLC is a Delaware limited liability
5 company with its principal place of business in Los Angeles, California.

6 9. Plaintiff Jazwares, LLC is a Delaware limited liability company with its
7 principal place of business in Broward County, Florida.

8 10. Plaintiff Kelly Amusement Holdings, LLC is a Delaware limited liability
9 company with its principal place of business in Syosset, New York.

10 11. Plaintiff Jazplus, LLC is a Delaware limited liability company with its
11 principal place of business in Broward County, Florida.

12 12. Plaintiffs are all affiliated entities, governed by common ownership and
13 intercompany agreements.

14 13. On March 31, 2020, non-party Kellytoy Worldwide, Inc., the previous
15 holder of the copyrights and trade dress rights at issue, assigned all legal title to the
16 distinctive trade dress associated with the Squishmallows products, as well as all
17 registered copyrights in and related to the Squishmallows products, to Plaintiff Kelly
18 Toys Holdings, LLC. Accordingly, Plaintiff Kelly Toys Holdings, LLC is the legal
19 owner of registered copyrights in and related to its Squishmallows products and the
20 Squishmallows trade dress.

21 14. Kelly Toys Holdings, LLC provides the rights to the remaining plaintiffs,
22 Jazwares, LLC, Kelly Amusement Holdings, LLC, and Jazplus, LLC, to sell and
23 distribute the Squishmallows products that incorporate the protected intellectual
24 property rights. Plaintiffs are all related companies that each independently have the
25 ability to inspect and monitor the Squishmallows products and to maintain the
26 products' quality. Each plaintiff thus has a cognizable interest in the infringement at
27 issue.
28

1 15. Defendant Zuru is a consumer toy limited liability company organized
2 under the laws of California with its principal place of business in California. Zuru is
3 the United States arm of non-party ZURU Group, a group of toy and consumer
4 products companies founded in Cambridge, New Zealand. Zuru is in the business of
5 manufacturing and selling children's toys, including plush toys.

6 **JURISDICTION AND VENUE**

7 16. This action involves the trademark laws of the United States, 15 U.S.C. §
8 1125(a), and, specifically, the statutory and common law of trade dress infringement.
9 This action also involves the copyright laws of the United States, 17 U.S.C. § 101, *et*
10 *seq.*

11 17. This Court has subject matter jurisdiction under 28 U.S.C. §§ 1331, 1338,
12 and 1367, and 15 U.S.C. §§ 1114, 1116, 1117, 1121, and 1125. Specifically, the Court
13 has federal question jurisdiction in this case over the claims brought under federal law
14 and supplemental jurisdiction over the claims brought under state law.

15 18. Venue lies in this judicial district pursuant to 28 U.S.C. § 1391 and
16 1400(a).

17 19. This Court has personal jurisdiction over Defendant Zuru because it is a
18 California limited liability company with its principal address listed as: 2121 E. Maple
19 Ave., El Segundo, CA 90245.

20 **BACKGROUND FACTS**

21 **Kelly Toys Launches Its Squishmallows Products**

22 20. Kelly Toys is an innovative and highly successful creator, manufacturer,
23 distributor, and seller of unique plush toys, including its Squishmallows line of plush
24 toys under the SQUISHMALLOWS brand.

25 21. In 2016, Kelly Toys conceived of and began creating its Squishmallows
26 line of plush toy designs that share common, unique features distinguishing them from
27 the goods of others. Most of these designs are the subject of United States Copyright
28 Registrations or pending applications therefor, and each is sold in commerce under the

1 Squishmallows brand. In essence, these creative development efforts produced an
2 entirely new class of plush toys that has carved a previously non-existent niche in the
3 marketplace.



15
16 22. Kelly Toys Holdings, LLC has been and is the sole owner of all right,
17 title, and interest in and to the Squishmallows products that possess unique,
18 recognizable and distinguishing features that are common across much of the
19 Squishmallows line. From 2016 to the present, Kelly Toys has expended large sums
20 of money in developing, advertising and promoting the Squishmallows Trade Dress
21 (defined below), and the product designs embodying it, throughout the United States.
22 In fact, Kelly Toys spends approximately \$1,000,000 annually in direct to consumer
23 and business-to-business advertising in connection with its Squishmallows products.

24 **Squishmallows Has a Distinctive Trade Dress**

25 23. Due to the distinctive Squishmallows trade dress, coupled with its unique
26 designs, extensive marketing efforts, media coverage, and market penetration, the
27 Squishmallows Trade Dress has acquired distinctiveness in the marketplace when
28 applied to plush toys. In fact, because of Kelly Toys' extensive promotional activities

1 and widespread display of plush toys embodying the Squishmallows Trade Dress
2 directed to the public, and as a consequence of Kelly Toys’ well-earned reputation for
3 fairness and integrity in dealings with its customers, the relevant consuming public has
4 come to recognize and associate plush toys embodying the trade dress as high quality
5 goods connected with or offered by Kelly Toys. As a result, that trade dress has
6 valuable goodwill and consumer recognition associated with it and has come to
7 symbolize the exemplary reputation of Kelly Toys.

8 24. Consistent with that advertising and marketing scope, Kelly Toys sells a
9 broad range of Squishmallows products featuring the iconic trade dress, and whose
10 overall look, feel and image—and in particular but without limitation its shapes,
11 colors, textures and graphics—serve as a distinctive source identifier to the consuming
12 public. Though not easily reduced to writing, these features include: (1) substantially
13 egg/bell shaped plush toys depicting various similarly shaped fanciful renditions of
14 animals/characters; (2) simplified Asian style Kawaii faces with repeating and
15 complementary rounded/oval shaped graphics depicting features on the characters
16 themselves (such as eyes, snouts and bellies) and which conform to and support the
17 overall egg/bell shape of the toys; (3) embroidered facial features, such as eyes,
18 nostrils, and/or mouths; (4) distinctive contrasting and non-monochrome coloring; and
19 (5) short-pile velvety velour-like textured exterior with a light and silky memory foam-
20 like stuffing providing an extremely soft and squeezable marshmallow feel (the
21 “Squishmallows Trade Dress”).










25. The Squishmallows Trade Dress, when viewed as a whole, presents a non-functional look and feel that is uniquely associated with Squishmallows. The aesthetic features of the Squishmallows Trade Dress do not have utilitarian functionality, as evidenced and underscored by the following facts: (1) the unique combination of the egg-shaped characters, simplified Kawaii face and repeated egg/bell shapes, embroidered facial features, distinct coloring, and velvety texture yields no utilitarian advantage over other plush toys; (2) there are innumerable alternative stylistic plush toy features available to and used by competitors, including, (i) countless alternative plush toy shapes (e.g. traditional animal designs as opposed to Squishmallows' whimsical, abstract renditions of animals and characters), (ii) numerous alternative means to depict facial features (e.g. plastic or bead eyes, features emulating realistic animals, countless different facial expressions); (iii) myriad alternative shell materials (e.g. terrycloth, long pile plush, velboa, satin), (iv) countless alternative stuffing materials available (e.g. beans, cotton, hard foam, wool, etc.), and (v) innumerable alternative plush designs and combinations of features actually used and available in the marketplace; (3) even if there were some utilitarian advantages of the Squishmallows Trade Dress, Kelly Toys' advertising does not tout or market those advantages; and (4) the Squishmallows Trade Dress is not the result from comparatively simple or inexpensive methods of manufactures vis-à-vis other plush toys.

26. Further, Squishmallows Trade Dress, when viewed as a whole, does not have aesthetic functionality, as protection of the specific combination of these aesthetic features would not impose a non-reputation-related competitive disadvantage against competitors. Competitors have successfully used innumerable alternative design elements and combinations of those elements, and the specific combination of the Squishmallows Trade Dress features does not serve an aesthetic function wholly independent of any source identifying function. To the contrary, the Squishmallows Trade Dress was specifically designed to distinguish – and has succeeded in distinguishing – the source of products embodying the Squishmallows Trade Dress from the source of other toys. Thus, any advantage gained from the specific combination of aesthetic features comprising the Squishmallows Trade Dress is based on Kelly Toys and Squishmallows’ reputation, as the specific combination of aesthetic features comprising the Squishmallows Trade Dress is highly distinctive and has become associated in the minds of the consuming public with plush toy products of the highest quality, originating from a single source – Squishmallows.

Kelly Toys Holdings, LLC Owns Copyrights in Squishmallows

27. Additionally, Kelly Toys Holdings, LLC is also the owner of registered copyrights in and related to its Squishmallows products (the “Squishmallows Works”), including listed those in the below chart:

Copyrighted Works	Copyright Number
	VAU001395927
	VA0002093073
	VA0002096023
	VA0002118285
	VA0002183993
	VA0002118286

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	VA0002093075
	VA0002148804
	VAU001395816
	VAU001399134
	VA0002127224
	VA0002137255

Squishmallows Are Distinctive and Popular

28. Kelly Toys and its predecessor have, beginning in 2016 and continuing without interruption, expended a great deal of time, effort, and money in the promotion of its Squishmallows line. And due to Kelly Toys’ distinctive designs, robust marketing efforts, media coverage, and market penetration, the Squishmallows Trade Dress has acquired distinctiveness in the marketplace when applied to plush toys. As a further result of Kelly Toys’ extensive promotional activities and widespread display of its Squishmallows directed to the public and as a result of its fairness and integrity mentioned above, the relevant consuming public has come to recognize and associate plush toys embodying the Squishmallows Trade Dress as high quality goods connected with or offered by a single source. The Squishmallows Trade Dress thus embodies valuable goodwill and consumer recognition associated with it and has come to symbolize valuable goodwill and reputation.

29. In addition to being original and inherently distinctive, the Squishmallows Trade Dress is also widely recognized by consumers. A simple Internet search using the Google search engine yields, for example, about 48,100,000 “hits” for the search term “Squishmallows.”

30. Beyond marketing and selling Squishmallows through thousands of retail stores nationwide, Kelly Toys additionally markets and sells its Squishmallows via its website www.squishmallows.com and on www.jazwares.com/brands/squishmallows, featuring dozens of copyright-protected photographs of its plush toys and models holding its Squishmallows.

31. Kelly Toys also actively engages in promoting its line of Squishmallows products through its numerous social media accounts, including on Instagram, TikTok, Facebook, and Twitter. Indeed, Kelly Toys’ legion of loyal fans of its line of Squishmallows have been extremely engaged on social media, including TikTok, Instagram, and Facebook, demonstrating their awareness and affection for Kelly Toys’ Squishmallows. Squishmallows videos have been viewed more than 11 billion times

1 on TikTok and fans have posted Squishmallows content more than 1 million times on
2 Instagram.

3 32. Kelly Toys' Squishmallows have become a phenomenon—they have
4 turned into a collectors' item, with their avid fanbase searching high and low to collect
5 as many of the over 3,000 different Squishmallows characters as possible.

6 33. Indeed, sales of Squishmallows have increased over 300% in 2022 alone,
7 with sales soaring to over \$200 million worldwide.

8 34. Further adding to their recognition and secondary meaning in the
9 marketplace, Squishmallows have been featured in over 300 publications, including
10 magazines, press articles, reviews, and videos, including many mainstream media
11 publications such as the Washington Post, the New York Times, TIME Magazine,
12 Forbes, The Guardian, the New York Post, the Costco Connections Magazine, People
13 Magazine, Seventeen Magazine, and many others. By way of example, the
14 Washington Post characterized Squishmallows as “the hottest toy on the market” and
15 described its avid fanbase as follows: “The fandom is often likened to the Beanie Baby
16 craze — and on its way to be an enduring brand like Hello Kitty and Pokémon.”²

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27 ² Jaclyn Peiser, *Adults Are Driving Sales of the Hottest Toy on the Market:*
28 *Squishmallows*, Wash. Post. (June 25, 2023),
<https://www.washingtonpost.com/business/2023/06/24/squishmallows-toy/>.



35. The New York Times has proclaimed that “Squishmallows are Taking Over,”³ Forbes named them “2022’s Must-Have Christmas Toy,”⁴ and The Guardian has recognized the toy’s rise in popularity on social media, writing that “Squishmallows go from TikTok sensation to top Christmas toy.”⁵

36. Squishmallows’ widespread popularity is further demonstrated by its recent October 2023 feature on the cover of Costco Connections, the magazine circulated monthly to nearly 15 million Costco members nationwide with advertisements for products sold at Costco, raving that “Squishmallows have taken

³ Taylor Lorenz, *Squishmallows Are Taking Over*, N.Y. Times (March 18, 2021), <https://www.nytimes.com/2021/03/16/style/squishmallows.html>.

⁴ Mark Faithfull, *Squishmallows Going Viral, Warren Buffet and 2022’s Must-Have Christmas Toy*, Forbes (Dec. 13, 2022), <https://www.forbes.com/sites/markfaithfull/2022/12/13/squishmallows-going-viral-warren-buffett-and-2022s-must-have-christmas-toy/?sh=692f77db22ad>.

⁵ Zoe Wood, *Squishmallows Go From TikTok Sensation to Top Christmas Toy*, Guardian (Dec. 9, 2022), <https://www.theguardian.com/business/2022/dec/09/squishmallows-go-from-tiktok-sensation-to-top-christmas-toy>.

1 over the toy world,” and that “as toy stores go, the marshmallow-like plush toy’s
2 meteoric rise to the top of the \$100 billion global toy market is one for the ages.”⁶

3 37. Squishmallows’ fandom ranges across all ages, from children to teens to
4 adults. Celebrities like Kim Kardashian and Lady Gaga have identified themselves as
5 avid devotees of the brand, and have published messages and photos of their
6 Squishmallows collections on their social media accounts:



27 ⁶ Mark Caldwell, *Soft Sell*, Costco Connection, Oct. 2023, at 22,
28 https://mobilecontent.costco.com/live/resource/img/static-us-connection-october-23/US_October_Connection_2023.pdf.



38. In September of 2022, Squishmallows was awarded the coveted “Toy of the Year,” “Plush Toy of the Year,” and the “People’s Choice” awards by The Toy Foundation. Squishmallows are so popular that they have been identified as the most popular toy brand across 41% of the U.S. states—far ahead of other well-known mega brands like Hot Wheels, Lego, Nintendo Switch, Nerf, and Play-Doh.

39. Due to Squishmallows’ massive success and popularity, consumers associate the high-quality Squishmallows toys with the Squishmallows Trade Dress.

Zuru Has a History of Selling Copycat and Defective Products

40. Zuru is a direct competitor of Kelly Toys in the plush toy market. However, unlike Kelly Toys, Zuru has made a business model of copying other well-known products, hoping to trade on the goodwill that those companies spent years garnering. Zuru and its parent company, Zuru Inc., have been sued in the past for similar forms of infringement, including for infringing on the trade dress of other well-known products. For example, LEGO sued Zuru, Inc. for its creation of miniature toys and packaging which were strikingly similar to the overall look and feel of LEGO’s products thereby deliberately creating consumer confusion:⁷

⁷ *LEGO A/S v. ZURU Inc.*, No. 18-cv-2045, Compl., ECF No. 1 at 12 (D. Conn. Dec. 13, 2018).

Authentic LEGO Product

Zuru Copycat Product



The court agreed with LEGO, granting a preliminary injunction enjoining Zuru from infringing on LEGO's copyrights and trademarks and denying Zuru's motion to dismiss the complaint, finding that LEGO had sufficiently alleged a claim for trade dress infringement.⁸

⁸ *LEGO A/S v. ZURU Inc.*, No. 18-cv-2045, 2019 WL 13158199, at *2 (D. Conn. July 8, 2019).

41. Zuru products are also of lesser quality. Just this year in June 2023, Zuru recalled 7.5 million bath toys after “multiple lacerations and puncture wounds were reported in children playing with them.”⁹ According to the United States Consumer Product Safety Commission, there were at least twelve injuries from those toys, nine of which required stitches or medical attention.





The Infringing Snackles Products

42. On June 16, 2023, Zuru launched “Snackles,” a line of plush toys that copies and imitates Squishmallows. To be clear, Zuru is not licensed or otherwise authorized by Kelly Toys to market or distribute products embodying the copyrighted designs or the Squishmallows Trade Dress.







43. Snackles toys have the *same* distinctive trade dress as the popular Squishmallows, including: shaped fanciful renditions of animals/characters; simplified Asian style Kawaii faces; embroidered facial features; distinctive and non-monochrome coloring; and velvety velour-like textured exterior. Side by side comparisons of Squishmallows and copycat Snackles products plainly show how striking the similarities are:

⁹ 7.5 Million Baby Shark Bath Toys are Recalled After They Cut or Stabbed Children, Associated Press (June 23, 2023), <https://apnews.com/article/zuru-baby-shark-bath-toys-recalled-2bace294be48edfb1bfc2bf17d57c097>.

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Squishmallows Original Product	Snackles Copycat Product
	
	

Squishmallows Original Product	Snackles Copycat Product
	
	
	

Squishmallows Original Product	Snackles Copycat Product
	
	
	

Squishmallows Original Product	Snackles Copycat Product
	
	
	

Zuru's Copycat Coco Squishies Products

44. Zuru has not limited its copying of Squishmallows to its Snackles line; rather, this is just one of several dubious Zuru product lines copying Squishmallows. For example, Zuru also sells a line of egg-shaped plush toys called "Coco Squishies." Not only has Zuru directly copied the name of Squishmallows, the Coco Squishies products also look *strikingly* like authentic Squishmallows. Zuru is directly trading off of Squishmallows' goodwill and brand name in the hopes that consumers will confuse the products and buy its own thinking they are authentic Squishmallows.

45. As depicted in the chart below, Zuru's Coco Squishies are direct copies of well-known and beloved Squishmallows characters:

Squishmallows Original Product	Coco Squishies Copycat Product
	
	



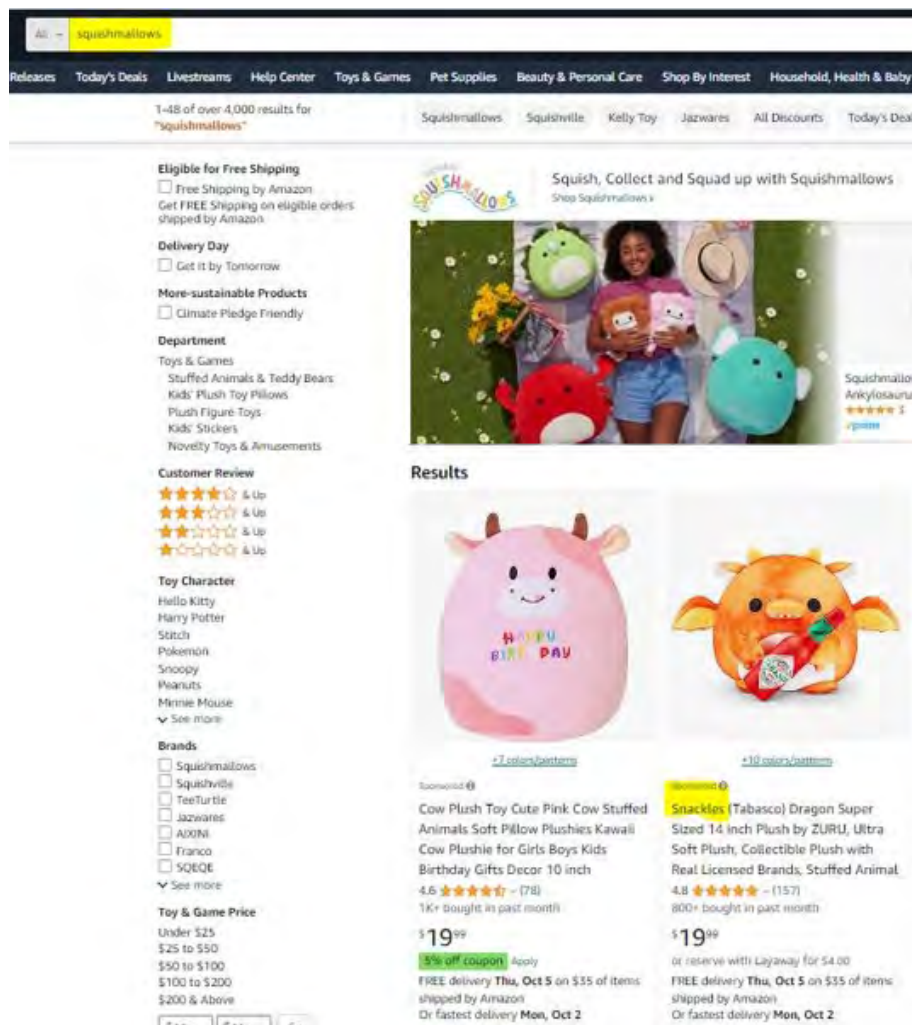
46. The direct resemblance between Coco Squishies and Squishmallows rules out any chance of coincidence. As shown above, Squishmallows has a pink poodle with curly pink hair atop its head and on its ears; Zuru created a pink poodle with curly pink hair atop its head and on its ears. Squishmallows has a white bull terrier with a pink belly, pink ears, and large dark spot on its eye; Zuru created a white bull terrier with a pink belly, pink ears, and a large dark spot on its eye. Squishmallows has a light grey husky with light blue eyes; Zuru created a light grey husky with blue eyes. Squishmallows has a dalmatian with a large black spot over its left eye; Zuru created a dalmatian with a large black spot over its left eye.

Consumer Confusion

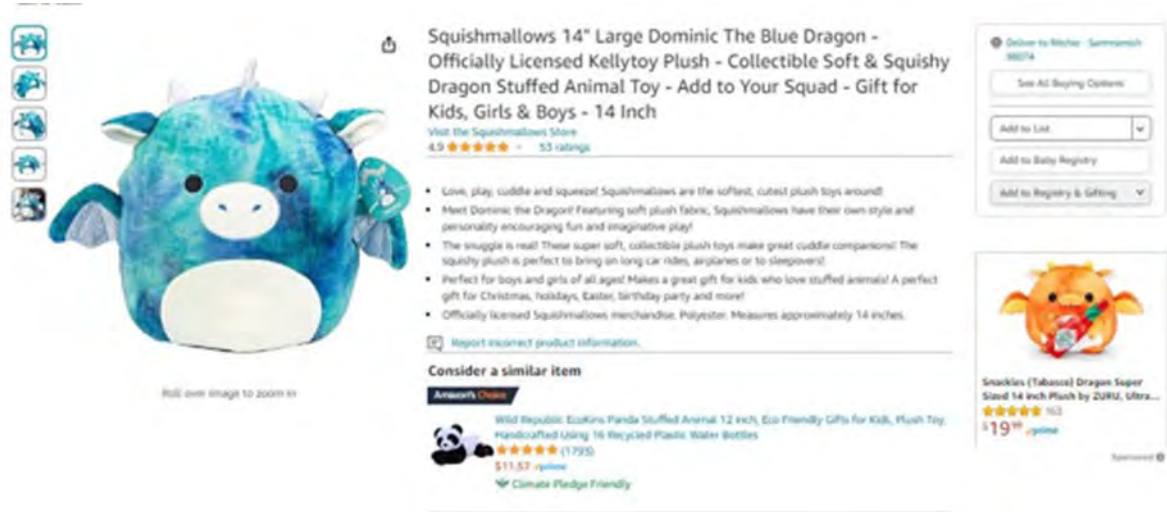
47. Not only do Snackles visually and tactilely simulate Squishmallows, but Zuru has also been trying to intentionally position its products to trick customers looking for Squishmallows into buying Snackles instead. Zuru has taken steps to

ensure that customers seeking out Squishmallows land upon the confusingly similar Snackles products instead.

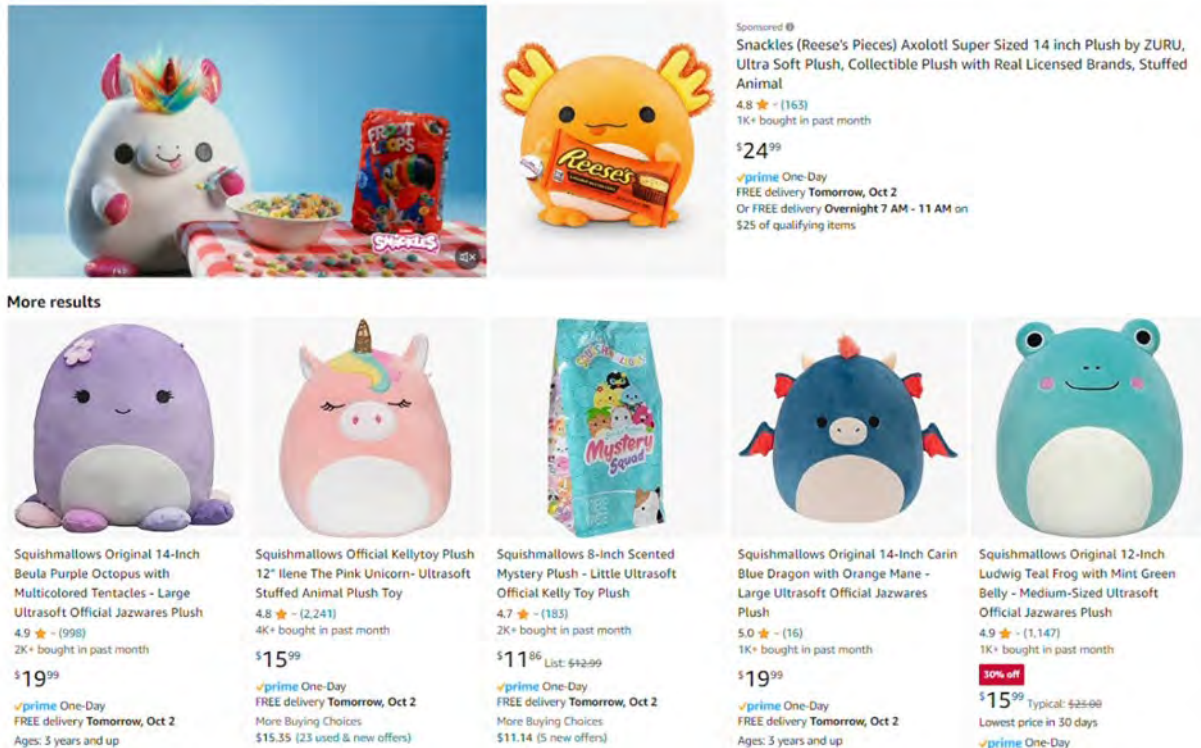
48. Upon information and belief, Zuru pays website operators for Snackles to appear when a user searches for “Squishmallows” on retail websites like Amazon.com. As shown below, Zuru is, upon information and belief, purchasing sponsored product and sponsored branded video campaigns under Squishmallows search terms. For example, when a consumer searches for “Squishmallows” on Amazon.com, some of the very first results they see will be Snackles products instead:



49. Similarly, when a customer is on a specific Squishmallows product on Amazon.com, Snackles advertising appears on the same page in an effort to confuse a consumer into thinking these are the same line of products:



50. Zuru has also purchased sponsored branded video campaigns on online retail websites under Squishmallows search terms, so that when a consumer searches for “Squishmallows” they may be met with the following Snackles ad, intermixed with authentic Squishmallows products:



51. Zuru does not limit this practice to online retailers: it also takes steps to confuse customers shopping in brick-and-mortar retail stores. Snackles products are placed *directly next* to Squishmallows products in retail stores in an effort to trick consumers into purchasing Snackles instead of Squishmallows. As depicted below, customers looking for Squishmallows were confused by the inclusion—on the very same shelf—of a Snackles cow that visually resembles Connor the Cow, a Squishmallows product. Moreover, another Snackles product is also mixed in with authentic Squishmallows:





10 52. Upon information and belief, Zuru negotiates for shelf space right next to
11 Squishmallows in retail stores in an effort to trick consumers. For example, the
12 following images show Snackles products displayed directly next to Squishmallows in
13 a Costco store:



53. Snackles products also create a likelihood of confusion with original Squishmallows products. In fact, there is evidence of *actual* consumer confusion. For example, consumer reviews on Snackles products show that consumers have purchased Snackles believing that they were buying Squishmallows instead:



prak

★★★★★ Soooo Cute

Reviewed in the United States on October 5, 2023

Color: Dragon (Tabasco) | **Verified Purchase**

My grandkids love Squishmallows. My grandson is going to be so surprised when he sees this devil with the hot sauce. Vibrant colors.



Tammy Huddy

★★★★★ LOVE! LOVE! LOVE!

Reviewed in the United States on October 8, 2023

Color: Sloth (Push Pop) | **Verified Purchase**

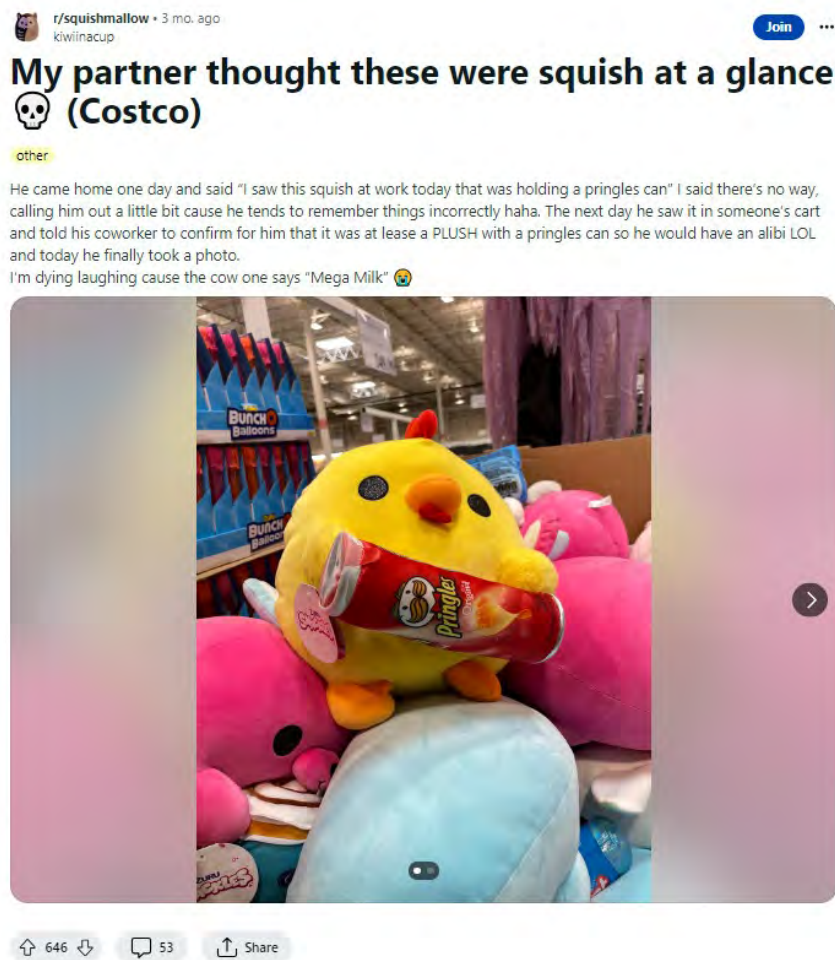
First of all, I think I love squishamallows more than my children! This one did not dissappoint! Purchased it as a gift. My child loves it so much that my other girls have requested one as well! Went ahead and purchased the Chicken and we have two mini versions as well!

Priced right and makes a great gift! Highly recommend!

Helpful

Report

54. Other consumers have aired their confusion, noting that they “thought [Snackles] were [Squishmallows] at a glance”:



55. As the comments on this photo show, other consumers were likewise tricked, again noting that Snackles are being placed “on a shelf right next to the [Squishmallows]” and observing that “they’re 100% trying to trick ppl like your partner”:





Dangerous_Avocado392 • 3 mo. ago

In his defense they're 100% trying to trick ppl like your partner. The font gives squish vibes but not enough for them to get sued or anything. Some of them are kinda cute tho. I'm so desperate for squish I would maybe get one lol. For some reason my Costco stopped stocking/selling squish? (I don't go every week) but I haven't seen one since ~March 🤔🤔

↑ 1 ↓ Reply Share ...

56. Other consumers have also noted how similar Snackles are to Squishmallows, even noting particular Squishmallows characters that have been clearly copied by Snackles:



r/squishmallow • 3 mo. ago
by iloveNarwhals100

Join ...

Thoughts on Zuru's new "Snackles"? If im being honest they're sort of cute but they also just look kinda like a lame attempt to make something squishmallow-esc

discussion



SquishmallowKing • 3 mo. ago

There's an axolotl who is a total rip-off of Nico.

↑ 1 ↓ Reply Share ...



Auswatt • 3 mo. ago

It's like a ripoff using the concept of those little plastic food characters imo

↑ 1 ↓ Reply Share ...

57. Consumers have noted the obvious similarities between Snackles and Squishmallows in comments of videos presenting Snackles products, including in some cases going so far as to confuse the product names and refer to Snackles products as "Snackmallows," "Snacksquishmallows," and "Snacksquishy":



pawgjade

Jade · 8-25

Follow

Found the snackmallow in [@Smyths Toys Superstores](#)

Of course ive only started with one and luckily got lottie the snackmallow i wanted. Do i need the whole collection?

[#snackmallow](#) [#squishy](#) [#squishies](#) [#squishi](#) [#snacksquishmallow](#)
[#snacksquishy](#)



Martina

They look like squishmallows

8-20 34 Reply

View 2 replies ▾



shyla(Taylor's_Version)

yo, these look like squishmallows

8-29 0 Reply



Autumn 🍁

Literally a rip off of squishmallows

9-18 1 Reply



rachel arnold

SQUISH MELLO DUPEEEE

1d ago 0 Reply



Garfieldhatesmondaysdotorg

Zuru jumping on the Squishmallows train five years too late. 😂

8-7 2 Reply

58. Zuru's actions have already caused significant harm. As a result of consumer confusion, Kelly Toys has lost potential customers, sales, and market share. For example, customer reviews reveal that customers looking for Squishmallows mistakenly purchased Zuru's Snackles products instead. And, upon information and belief, even customers who knew the difference between Squishmallows and Snackles before purchase have mistakenly purchased Snackles because of Zuru's use of the Squishmallows Trade Dress and infringement of the Squishmallows products.

59. Moreover, Zuru's bidding on Squishmallows search terms on online retailer sites has forced Kelly Toys to in turn increase its spend on search terms for its own "Squishmallows" mark. In other words, Kelly Toys has had to spend more money to ensure that when consumers search for "Squishmallows," they will be shown Squishmallows products and not copycat Snackles products strategically placed to confuse them.

60. In sum, Zuru's willful conduct has damaged and will continue to irreparably damage the reputation, business, and goodwill of Kelly Toys. And, unless enjoined, Zuru will continue to further escalate their infringing activities.

FIRST CAUSE OF ACTION

(Trade Dress Infringement – 15 U.S.C. § 1125)

61. Kelly Toys repeats, realleges, and incorporates each and every allegation made above as if fully set forth herein.

62. Kelly Toys Holdings, LLC owns and has a protectable interest in the Squishmallows Trade Dress.

63. As owner of all rights, title and interest in and to the Squishmallows Trade Dress, Kelly Toys Holdings, LLC has standing to maintain an action for trade dress infringement under the Lanham Act including, 15 U.S.C. § 1125.

64. The Squishmallows Trade Dress is nonfunctional and highly distinctive and has become associated in the public mind with plush toy products of the highest quality and reputation finding their origin in a single source, the Squishmallows brand.

1 65. The Squishmallows Trade Dress has acquired secondary meaning based
2 upon, at least in part, the amount and manner of advertising of products embodying
3 the Squishmallows Trade Dress, the volume of sales, as well as the length and manner
4 of use of the products.

5 66. The Squishmallows Trade Dress is nonfunctional because its distinctive
6 aesthetic features yield no utilitarian advantage, there are innumerable alternative
7 stylistic plush toy features available to competitors, even if there were some utilitarian
8 advantages of the design, Kelly Toys' advertising does not tout or market those
9 advantages, and the Squishmallows Trade Dress is not the result from comparatively
10 simple or inexpensive methods of manufacture. Furthermore, protection of the
11 specific combination of the aesthetic features consistent across Squishmallows brand
12 plush toys would not impose a non-reputation-related competitive disadvantage
13 against competitors, as there are innumerable alternative design elements and
14 combinations of those elements for competitors to utilize. The combination of the
15 Squishmallows Trade Dress features does not serve an aesthetic function wholly
16 independent of any source identifying function; rather, the highly distinctive
17 Squishmallows Trade Dress is intended to distinguish Kelly Toys products from those
18 of competitors.

19 67. Without Kelly Toys' authorization or consent, and having knowledge of
20 Kelly Toys Holdings, LLC's prior rights in the Squishmallows Trade Dress, Defendant
21 has designed, manufactured, distributed, advertised, offered for sale and/or will
22 continue to design, distribute, advertise, offer for sale, and sell replicas of the
23 Squishmallows Trade Dress to the consuming public in direct competition with Kelly
24 Toys, in or affecting interstate commerce.

25 68. Zuru's infringing designs are, each alone and together, confusingly
26 similar to the Squishmallows Trade Dress. Defendant's use of the Squishmallows
27 Trade Dress has caused, and unless enjoined by this Court, will continue to cause a
28 likelihood of confusion and deception of members of the public and, additionally,

1 irreparable injury to goodwill and reputation associated with the Squishmallows Trade
2 Dress.

3 69. Defendant's use of the Squishmallows Trade Dress thus constitutes trade
4 dress infringement in violation of 15 U.S.C. § 1125(a).

5 70. As further evidence of Zuru's intent to trade upon Kelly Toys' goodwill
6 in its Squishmallows Trade Dress, in order to ensure consumer confusion, Zuru not
7 only copied Squishmallows Trade Dress and original designs, but also incorporated
8 product placement with products that Kelly Toys had already licensed for use in
9 collaboration with its Squishmallows toys.

10 71. As a direct and proximate result of Zuru's unlawful conduct, it has
11 misappropriated Kelly Toys Holdings, LLC's rights in the Squishmallows Trade
12 Dress, as well as the goodwill associated therewith, and has diverted sales and profits
13 from Kelly Toys to Zuru. Thus, as a direct and proximate result of Defendant's acts
14 of willful infringement, Kelly Toys has suffered and/or will suffer irreparable damage
15 to its valuable brand and reputation, and other damages in an amount to be proven at
16 trial, including Defendant's profits and Kelly Toys' lost profits.

17 72. Defendant's actions described above will cause, have caused, and will
18 continue to cause irreparable damage to Kelly Toys, unless Defendant is enjoined by
19 this Court. Kelly Toys has no adequate remedy at law with regard to Defendant's
20 infringing conduct. Accordingly, Kelly Toys is entitled to a permanent injunction,
21 pursuant to 15 U.S.C. § 1116, restraining and enjoining Defendants' and their agents,
22 servants, and employees, and all persons acting thereunder, in concert with, or on their
23 behalf, from using Kelly Toys' Squishmallows Trade Dress, or any colorable imitation
24 or variation thereof, in connection with the sale and/or marketing of any products.

25 73. Defendant's aforesaid acts are exceptional within the meaning of 15
26 U.S.C. § 1117.

SECOND CAUSE OF ACTION

(California Common Law Trade Dress Infringement)

74. Kelly Toys repeats, realleges, and incorporates each and every allegation made above as if fully set forth herein.

75. Kelly Toys Holdings, LLC is the owner of all right, title, and interest in and to the Squishmallows Trade Dress used by Kelly Toys by virtue of its extensive manufacture and sale of products embodying such trade dress as set forth in the preceding paragraphs of the Complaint.

76. Kelly Toys' common law trade dress is distinctive, and furthermore, has acquired secondary meaning. Kelly Toys has continuously used its Squishmallows Trade Dress to identify its goods in California and elsewhere, and to distinguish them from goods of a different origin. As such, there are common law rights to the Squishmallows Trade Dress.

77. The Squishmallows Trade Dress is nonfunctional and highly distinctive and has become associated in the public mind with plush toy products of the highest quality and reputation finding their origin in a single source, Kelly Toys.

78. The Squishmallows Trade Dress has acquired secondary meaning based upon, at least in part, the amount and manner of advertising of products embodying the Squishmallows Trade Dress, the volume of sales, as well as the length and manner of use of the products.

79. The Squishmallows Trade Dress is nonfunctional because its distinctive aesthetic features yield no utilitarian advantage, there are innumerable alternative stylistic plush toy features available to competitors, even if there were some utilitarian advantages of the design, Kelly Toys' advertising does not tout or market those advantages, and the Squishmallows Trade Dress is not the result from comparatively simple or inexpensive methods of manufacture. Furthermore, protection of the specific combination of the aesthetic features consistent across Squishmallows products would not impose a non-reputation-related competitive disadvantage against

competitors, as there are innumerable alternative design elements and combinations of those elements for competitors to utilize. The combination of the Squishmallows Trade Dress features does not serve an aesthetic function wholly independent of any source identifying function. Rather, the highly distinctive Squishmallows Trade Dress is intended to distinguish Kelly Toys' plush toys from those of competitors.

80. The infringing products advertised, distributed, offered for sale, and sold by Defendant incorporate matter constituting replicas and imitations of Kelly Toys' common law trade dress. Such unauthorized use by Defendant of Kelly Toys' common law trade dress constitutes common law trade dress infringement and has already caused, and will likely continue to cause, confusion and mistake in the minds of the trade and the purchasing public as to the source of the products and is causing purchasers to believe such products are authentic products of Kelly Toys when, in fact, they are not.

81. Upon information and belief, Defendant has willfully and intentionally misappropriated aspects of Kelly Toys' common law trade dress with the intent of causing confusion, mistake, and deception as to the source of its goods and with the intent to palm off its goods as those of Kelly Toys, and as such, Defendant has committed trade dress infringement under the common law.

82. By such actions in infringing Kelly Toys' common law trade dress, Defendants are improperly trading upon the reputation and goodwill, and are impairing valuable rights in, such trade dress.

83. Upon information and belief, Defendant has committed the above alleged acts in conscious disregard of Kelly Toys' rights, and Kelly Toys is therefore entitled to punitive damages pursuant to the common law of the State of California.

84. Kelly Toys has no adequate remedy at law. The conduct of Defendant has caused and, if not enjoined, will continue to cause, irreparable damage to the rights in and business, reputation, and goodwill of the Squishmallows Trade Dress.

THIRD CAUSE OF ACTION

(Federal Copyright Infringement – 17 U.S.C. § 501(a))

85. Kelly Toys repeats, realleges, and incorporates each and every allegation made above as if fully set forth herein.

86. Kelly Toys Holdings, LLC is the exclusive owner of the Squishmallows Works.



87. On information and belief, Defendant had actual notice of Plaintiffs' exclusive rights in and to the Squishmallows Works.

88. Defendant did not attempt and therefore inherently failed to obtain Plaintiffs' consent or authorization to use, manufacture, reproduce, copy, display, prepare derivative works of, distribute, sell, transfer, rent, perform and/or market Plaintiffs' Squishmallows Works.

89. Without permission, Defendant knowingly and intentionally reproduced, copied, and displayed the Squishmallows Works by manufacturing, advertising, marketing, promoting, distributing, displaying, offering for sale and/or selling infringing products which bear such Squishmallows Works, or artwork that is, at a minimum, substantially similar to the Squishmallows Works. For example:

Copyrighted Works	Copyright Number	Infringing Zuru Product
	VAU001395927	 “Hugh”
	VA0002093073	 “Daisy”
	VA0002096023	 “Terry”
	VA0002118285	 “Terry”
	VA0002183993	 “Terry”
	VA0002118286	 “Dani”

1		VA0002093075	
2			"Richard"
3			
4			
5			
6		VA0002148804	
7			"Richard"
8			
9			
10		VAU001395816	
11			"Richard"
12			
13			
14			
15		VAU001399134	
16			"Susie"
17			
18			
19			
20		VA0002127224	
21			"Susie"
22			
23			
24			
25			

	VA0002137255	 "Lottie"
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90. Defendant’s unlawful and willful actions as alleged herein constitute infringement of the Squishmallows Works, including exclusive rights to reproduce, distribute and/or sell such Squishmallows Works in violation of 17 U.S.C. § 501(a).

91. Defendant’s knowing and intentional copyright infringement, as alleged herein, has caused substantial and irreparable harm to Plaintiffs in an amount as yet unknown but to be proven at trial, for which Plaintiffs have no adequate remedy at law, and unless enjoined, Defendant will continue to cause substantial and irreparable harm to Plaintiffs.

92. Based on Defendant’s wrongful conduct, Plaintiffs are entitled to injunctive relief, Plaintiffs’ actual damages and lost profits, and Defendant’s profits arising from Defendant’s conduct complained of herein, including any profits that are attributable to the infringement and are not taken into account in computing the actual damages, in an amount to be proven at trial and enhanced discretionary damages for willful copyright infringement, and reasonable attorneys’ fees and costs.

FOURTH CAUSE OF ACTION

(California Common Law Unfair Competition)

93. Kelly Toys repeats, realleges, and incorporates each and every allegation made above as if fully set forth herein.

94. This claim arises under the common law of the State of California relating to unfair competition.

95. Defendant’s infringing products incorporate matter constituting reproductions, copies, and/or colorable imitations of Kelly Toys’ Squishmallows Trade Dress. Defendant’s unauthorized use of Kelly Toys’ Squishmallows Trade

1 Dress constitutes unfair competition, and is likely to cause confusion and mistake in
2 the minds of the trade and the purchasing public as to the source of Defendant's
3 products and to cause purchasers to believe that Defendant's products are authentic
4 products of Kelly Toys when in fact, they are not.

5 96. Upon information and belief, Defendant has intentionally appropriated
6 Kelly Toys' Squishmallows Trade Dress with the intent of causing confusion, mistake,
7 and deception as to the source of its goods and with the intent of palming off their
8 goods as those of Kelly Toys. Defendant has thus committed unfair competition under
9 the common law of the State of California.

10 97. By its actions in infringing Kelly Toys' Squishmallows Trade Dress,
11 Defendant is improperly trading upon the reputation and goodwill, and impairing
12 valuable rights in, the Squishmallows Trade Dress.

13 98. Upon information and belief, said activities of Defendant have caused,
14 and if not enjoined, will continue to cause, irreparable harm and damage to the rights
15 in the Squishmallows Trade Dress and to business reputation and goodwill.

16 99. Upon information and belief, Defendant has engaged in the unlawful
17 conduct alleged herein intentionally, maliciously, fraudulently, and oppressively
18 entitling Kelly Toys to punitive damages in an amount to be determined at trial.

19 **FIFTH CAUSE OF ACTION**

20 **(California Statutory Unfair Competition –**

21 **Cal. Bus. & Prof. Code § 17200, *et seq.*)**

22 100. Kelly Toys repeats, realleges, and incorporates each and every allegation
23 made above as if fully set forth herein.

24 101. By reason of the foregoing, Defendant has been and is engaged in
25 "unlawful, unfair or fraudulent business practices" in violation of Cal. Bus. & Prof.
26 Code § 17200 *et seq.*

27 102. Kelly Toys Holdings, LLC is the exclusive owner of the Squishmallows
28 Works, and its Squishmallows Trade Dress constitutes a protectable property right.

Defendant's conduct—including without limitation its infringement of the Squishmallows Trade Dress and Kelly Toys Holdings, LLC's registered copyrights—will and has caused an impairment and diminishment of Kelly Toys' rights. Indeed, the activities of Defendant have caused and, if not enjoined, will continue to cause irreparable harm and damage to the rights in the Squishmallows Trade Dress, ownership rights of the Squishmallows Works, and to business reputation and goodwill. Kelly Toys has no adequate remedy at law for these wrongs and injuries. The damage to Kelly Toys includes harm to its goodwill and reputation in the marketplace that money cannot compensate. Accordingly, Kelly Toys is entitled to a permanent injunction restraining and enjoining Defendant and its agents, servants, employees, and all persons acting thereunder, in concert with, or on its behalf, from using Squishmallows Trade Dress or infringing on the Squishmallows Works, or any colorable imitation or variation thereof, in connection with the sale and/or marketing of any products. Kelly Toys is further entitled to recover its costs and attorneys' fees incurred in bringing and prosecuting this action.

PRAYER FOR RELIEF

WHEREFORE, Kelly Toys prays for judgment against Defendant as follows:

a. That Defendant, its officers, members, directors, agents, servants, employees, successors, licensees, representatives, assigns, and all persons acting in concert or participation with them, be permanently enjoined and restrained from:

- (i) Manufacturing, distributing, advertising, offering to sell or selling their infringing products or any colorable imitations of the Squishmallows Trade Dress or the Squishmallows Works;
- (ii) Using the Squishmallows Trade Dress or any confusingly similar trade dress in connection with plush or other toys;
- (iii) Using the Squishmallows Trade Dress, or any confusingly similar trade dress, in connection with the advertisement, offer to sell, or sale of any toy products;

- (iv) Using imitations of the Squishmallows Works in connection with plush toys or other goods;
- (v) Infringing or contributing to infringement of Kelly Toys Holdings, LLC's copyrights or trade dress, or otherwise engaging in unfair competition with Kelly Toys in any manner or engaging in any conduct tending to falsely represent or likely to confuse, mislead, or deceive suppliers, purchasers, or any member of the public into thinking that Defendant or any of their products are affiliated with Kelly Toys or that Kelly Toys has otherwise sponsored, approved, or licensed any products or services of Defendant;
- (vi) Engaging in any other activity constituting unfair competition with Kelly Toys, or constituting infringement of the Squishmallows Trade Dress or Squishmallows Works; and
- (vii) Assisting, aiding, or abetting any other person or business entity in engaging or performing any of the activities referred to in subparagraphs (i) through (vi) above, or effecting any assignments or transfers, forming new entities or associations, or utilizing any other device for the purpose of circumventing or otherwise avoiding the prohibitions set forth in subparagraphs (i) through (vi) above.

b. That Defendant be directed to file with the Court and serve on Kelly Toys, within thirty (30) days after entry of a final injunction, a report in writing under oath setting forth in detail the manner and form in which Defendant has complied with the injunction;

c. That Kelly Toys Holdings, LLC has superior rights to exclusive use in the Squishmallows Works and the Squishmallows Trade Dress in connection with toys vis-à-vis Defendant;

d. That the Court direct any third parties providing services to Defendant in connection with any infringing and/or enjoined conduct, including social media

1 platforms (*e.g.*, Instagram, Facebook, Twitter), online marketplaces (*e.g.*, Amazon,
2 Etsy, eBay, Alibaba), online payment providers, including credit card companies (*e.g.*,
3 PayPal, Visa) and other service providers (*e.g.*, Google, GoDaddy, LiveChat, Shopify)
4 to cease providing services to Defendant in connection with the offer for sale and sale
5 of the infringing products or any other products using, infringing, or embodying the
6 Squishmallows Trade Dress or the Squishmallows Works;

7 e. That Defendant be required to pay Kelly Toys such damages as it has
8 sustained as a consequence of Defendant's infringement of the Squishmallows Trade
9 Dress and the Squishmallows Works and trebling of those damages under 15 U.S.C. §
10 1117;

11 f. Adjudge that the Defendant, by its unauthorized use of Kelly Toys'
12 Squishmallows Trade Dress and Squishmallows Works for plush toys, and other acts
13 as it may have undertaken relating to the Squishmallows Trade Dress and/or
14 Squishmallows Works, has violated Kelly Toys' rights under 15 U.S.C. § 1125(a), 17
15 U.S.C. § 501(a), under California state law (including, without limitation, Cal. Bus. &
16 Prof. Code § 17200 *et seq.*), and under common law, and that they have done so
17 willfully;

18 g. Direct Defendant to provide Kelly Toys with an identification in writing
19 of any and all entities that are presently using the Squishmallows Trade Dress or
20 Squishmallows Works on Defendant's behalf and inform them that they must
21 immediately cease such use;

22 h. Direct Defendant to immediately recall any and all merchandise
23 previously provided to any entity embodying or using the Squishmallows Trade Dress
24 or the Squishmallows Works;

25 i. Enter an order, pursuant to 15 U.S.C. § 1118, directing Defendant to
26 deliver for destruction all products, brochures, marketing materials, decals, stickers,
27 signs, prints, packages, receptacles, wrappers, boxes, and advertisements in their
28 possession or under their control, embodying any unauthorized copy of the

1 Squishmallows Trade Dress or any of the Squishmallows Works, or any simulation,
2 reproduction, counterfeit, copy, confusingly similar likeness, or colorable imitation
3 therefor, and all plates, molds, matrices, programs, and other means of making the
4 same;

5 j. That Defendant provide Kelly Toys in writing with the following
6 information relating to Defendant's goods marketed, advertised, offered for sale, or
7 sold under either or both of the Squishmallows Trade Dress and/or Squishmallows
8 Works:

9 (i) the name, address, and telephone number of each and every United
10 States entity to whom Defendant has made available or otherwise
11 provided any such products;

12 (ii) the total number of units distributed and sold;

13 (iii) the total number of units remaining in inventory; and

14 (iv) a full accounting as to the precise dollar amount of such products
15 made available or provided and the profits recognized by
16 Defendant in connection with such actions;

17 k. Direct Defendant to pay the costs of corrective advertising;

18 l. Direct Defendant to pay Plaintiffs' attorneys' fees and costs incurred in
19 initiating and prosecuting this action;

20 m. Direct Defendant to pay punitive damages and exemplary damages
21 according to proof;

22 n. That Kelly Toys recover its actual damages, Kelly Toys' lost profits, and
23 Defendant's profits arising from Defendant's conduct complained of herein, including
24 any profits that are attributable to the infringement and are not taken into account in
25 computing the actual damages;

26 o. That the Court award enhanced and treble damages;

27 p. That Kelly Toys be awarded interest, including pre-judgment interest, on
28 the foregoing sums;

1 q. That the Court direct such other actions as it may deem just and proper to
2 prevent the public from deriving the mistaken impression that and products or services
3 offered, advertised, or promoted by or on behalf of Defendant is authorized by Kelly
4 Toys or related in any way to Kelly Toys' products or services; and

5 r. For such other and further relief as the Court may deem just and proper.

6
7 Dated: November 2, 2023

HUESTON HENNIGAN LLP

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11 By: /s/ Moez M. Kaba

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DEMAND FOR JURY TRIAL

Kelly Toys hereby demands a trial by jury.

Dated: November 2, 2023

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

KELLY TOYS HOLDINGS, LLC;
JAZWARES, LLC; KELLY
AMUSEMENT HOLDINGS, LLC; and
JAZPLUS, LLC

Plaintiffs,

v.

ZURU, LLC,

Defendant.

Case No. 2:23-cv-09255 MCS(AGRx)

**ZURU, LLC's NOTICE OF MOTION
AND MOTION TO DISMISS**

Hon. Mark C. Scarsi

Date: February 12, 2024*

Time: 9:00 AM

Court: First Street, 7C

* As noted in the Parties' Stipulation at Dkt. 22, n.2, the Standing Order seemed to impose constraints on the timing of the hearing date. Zuru requests the earliest available hearing date consistent with the Parties' proposed briefing schedule at Dkt. 22.

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on Monday, February 12, 2024, at 9:00 AM (or as determined by the Court consistent with the parties' proposed briefing schedule at Dkt. 22) before the Honorable Mark C. Scarsi at the First Street Courthouse, 350 W. 1st Street, Courtroom 7C, 7th floor, Los Angeles, California 90012, Defendant, Zuru, LLC ("Zuru") will, and hereby does respectfully move to dismiss Plaintiffs' Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). The motion is made on the grounds that Plaintiffs have failed to plausibly articulate protectable trade dress, and Plaintiffs have failed to confirm whether they have supplied deposit copy images of their alleged copyright registrations. Zuru also moves unopposed on two other grounds discussed herein.

This Motion is made following the conference of counsel pursuant to L.R. 7-3 which took place on December 18, 2023, as well as subsequent correspondence. This Motion is based on this Notice of Motion and Motion, Memorandum of Points and Authorities, the accompanying Declaration of Jean-Paul Ciardullo, the Request for Judicial Notice and exhibits attached thereto, the accompanying Proposed Order, and all pleadings, papers, and records on file in this action, and such matters of which this Court may take judicial notice, and upon such further oral argument and documentary evidence as may be presented at the time of hearing.

Dated: December 22, 2023

Foley & Lardner LLP

/s/ Jean-Paul Ciardullo
Jean-Paul Ciardullo

Attorneys for Defendant
ZURU, LLC

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I. INTRODUCTION

Defendant Zuru, LLC (“Zuru”) moves under Fed. R. Civ. P. 12(b)(6) to dismiss Plaintiffs’ Complaint. Specifically, Plaintiffs’ trade dress claims under the Lanham Act and state law fail to articulate a plausible and proper definition of the asserted trade dress. Unlike a typical trade dress case in which the plaintiff claims rights in a single product, Plaintiffs overreachingly attempt to claim rights in an entire product category of hundreds (perhaps thousands) of different-looking designs of which Plaintiffs have failed to give proper notice in their Complaint. As observed in the McCarthy treatise, “[w]hen it is claimed that the trade dress is inherent in an entire series or line of products, the proponent faces the ‘particularly difficult challenge’ of proving the validity of a broadly defined trade dress which is common to all items in the series or line.” 1 J. Thomas McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION §8:5.50 (5th ed. 2020).

On its face, Plaintiffs’ vague and overbroad definition of the trade dress – filled with conclusory and undefined terms like “distinctive” and “Asian style” – goes well beyond the particular toys at issue in this case, and would impermissibly ensnare an entire product category of generic round stuffed animals with cartoonish faces. Significantly, Plaintiffs’ definition of the trade dress would even encompass non-party competitors’ products for which Plaintiffs previously retracted infringement claims, demonstrating that Plaintiffs’ definition fails to give any reasonable guidance as to what would or would not be considered infringing. Undoubtedly aware of the inherent problem in trying to claim trade dress across so many different-looking products, Plaintiffs have not attempted to file for any federal trade dress registration, nor is it plausible that they could provide any coherent drawing of their vaguely-claimed trade dress that could satisfy Trademark Office regulations. In the 2019 *Dan-Dee* case, a Central District of California Court already dismissed Plaintiffs’ equivalent trade dress claims on the grounds that Plaintiffs had failed to properly articulate their claimed trade dress. This Court should reach the same result.

Zuru also seeks dismissal on certain other narrower but important grounds discussed herein, some of which Plaintiffs have stated they will not oppose.

II. BACKGROUND

A. Plaintiffs and Squishmallows

According to Plaintiffs, Squishmallows were introduced in 2016. (Complaint, ¶1.) The products were originally sold by a predecessor company called Kellytoy Worldwide, Inc., which then transferred all purported intellectual property rights to current plaintiff Kelly Toys Holdings, LLC (“KTH”) in March 2020. (*Id.*, ¶13.) Plaintiff Jazwares, LLC (“Jazwares”) is a separate toy company that acquired KTH (apparently as part of that same transaction), and currently holds KTH as a separate subsidiary. (Dkt. 5.) Jazwares is in turn owned by the insurance company Alleghany Corporation. (*Id.*) The Complaint states that KTH is the owner of all the purported intellectual property at issue and that it “provides the rights to the remaining plaintiffs [] to sell and distribute the Squishmallows products that incorporate the protected intellectual property rights.” (Complaint, ¶14.) The Complaint does not otherwise explain the relationship among the four plaintiffs, the substance of any intellectual property licensing arrangement among them, whether such arrangements are exclusive, or what specifically each plaintiff does in the marketplace.

Although the Complaint only shows pictures of a handful of Squishmallows, the Squishmallows product line in fact consists of hundreds (or possibly thousands) of different products comprising vastly different-looking characters, and assuming a variety of different configurations. Examples of these can be found in **Exhibit A** to the concurrent Request for Judicial Notice, which contains images of Squishmallows compiled from Plaintiffs’ pleadings in other lawsuits. Further images of Squishmallows from Amazon.com, Walmart.com, and Target.com are included at Exhibits B-D to that Request.¹

¹ As further discussed in Zuru’s concurrently filed Request for Judicial Notice, such publicly-available search results may be judicially noticed, and Zuru takes no substantive position on their content beyond that they show Squishmallows.

Samples of some of the images from Exhibit A are shown below:



1 Plaintiffs have even turned Squishmallows into stuffed animal slippers, pet beds, and
2 stackable pillows, as shown below.²



17 In fact, the limitless diversity of different Squishmallows eludes any straightforward
18 listing. The pictures in Plaintiffs' Complaint (e.g., pp. 2, 8) amount to only a small
19 percentage of Squishmallows, failing to adequately convey their diversity of appearance.
20 Indeed, it may be that Plaintiffs have intentionally embraced a certain degree of ambiguity
21 surrounding the full scope of their product line as a marketing tactic. The Jazwares website
22 itself only lists a small percentage of the products, and appears to be in a state of constant
23 flux.

26 ² These images were collected from the Jazwares website
27 (<https://shop.jazwares.com/pages/squishmallows>), and from Walmart.com (see Exhibit C
28 to concurrent Request for Judicial Notice). As discussed in Zuru's Request for Judicial
Notice, it is permissible to take notice of these.

Squishmallows are sold under a prominent stylized logo reading “Original Squishmallows,” that is displayed on product hangtags, store displays, and websites:³



Although Plaintiffs’ present Complaint purports to assert trade dress rights, there is no public record available at the U.S. Trademark Office website of any attempt by Plaintiffs to formally register any trade dress in the Squishmallows, and as part of the meet and confer on this Motion, Plaintiffs confirmed no such applications are pending. (Ciardullo Dec., ¶3.) The fact that Plaintiffs have not sought registration deprives the designs of any presumption of validity, and places a hefty burden of proof on Plaintiffs to establish such rights. Indeed, as discussed *infra*, Zuru does not believe that Plaintiffs could satisfy regulatory requirements for visually depicting their trade dress because there is no consistency across

³ The image of the Squishmallows bin is from the Complaint, p.30. The other images were obtained from the Jazwares website and are properly the subject of judicial notice. See concurrently filed Request for Judicial Notice.

the product line, and hence no way to define the trade dress across the line.

With respect to copyright, although certain of the Squishmallows designs have purportedly been registered, Plaintiffs make no claim of having registered the others, including many that are shown in the Complaint. This belies the supposed importance of the asserted designs.

In fact, Plaintiffs have had difficulty enforcing their purported Squishmallows intellectual property in past litigation, including in this District.

In *Kellytoy Worldwide, Inc. et al v. TY, Inc. et al.*, No. 20-cv-00748 (N.D. Ill. Jan. 31, 2020) (“Ty Case”), Plaintiffs had sued Ty over stuffed toys depicted below:



(Ty Case, Dkt. 1-9.)

The Illinois court denied Plaintiffs’ Preliminary Injunction Motion, observing that Plaintiffs had only a “modest likelihood of showing that the Squishmallows trade dress is valid,” and that its overall chance of success the case was “weak.” *Kellytoy Worldwide, Inc. v. TY, Inc.*, No. 20 C 748, 2020 WL 5026255, at *9-10 (N.D. Ill. Aug. 25, 2020). The

Ty Case was later dismissed, with Plaintiffs allowing Ty to continue to sell the accused products, amounting to an admission that Plaintiffs' claimed rights could not extend to those products or any others of similar appearance to them. Below is an image from Ty's current website:⁴



Similarly, Plaintiffs had sued toy company Dan-Dee in this District in 2019. *Kellytoy USA, Inc. et al v. Dan-Dee International, Ltd. et al.*, 2:18-cv-05399-JAK (“Dan-Dee Case”), accusing Dan-Dee’s plush toys of infringing Plaintiffs’ alleged trade dress and copyrights. Dan-Dee moved to dismiss the complaint under Rule 12(b)(6) arguing (as Zuru now argues in the present Motion) that Plaintiffs had failed to adequately define their purported trade dress in the Squishmallows. The Court granted Dan-Dee’s motion, ruling that “in light of the substantial differences among the designs of the products in the Squishmallows line, the images included in the FAC do not provide the level of clarity about the nature and scope of the claimed trade dress as is required by the caselaw.” (Dan-Dee Case, Dkt. 39, “Dan-Dee Order,” copy attached as Ciardullo Ex. 1.)

Plaintiffs amended their complaint, but Dan-Dee moved to dismiss again on the same grounds. (Dan-Dee Case, Dkt. 57.) The case was then dismissed before the Court could rule on the second motion. (*Id.*, Dkt. 74.) An online search shows that Dan-Dee is

⁴ The Court may take judicial notice of the products that Ty continues to sell on its website at shop.ty.com. See concurrent Request for Judicial Notice, Exhibit E.

1 apparently still selling the product shown here.⁵

2 **B. Zuru and Snackles**

3 Zuru, LLC is the United States arm of the ZURU
4 Group, a group of family-owned toy and consumer
5 products companies founded in Cambridge, New
6 Zealand in 2004. The ZURU Group is one of the fastest
7 growing toy brands in the world and is known for their
8 creativity and new-age manufacturing techniques. The
9 ZURU Group has successfully built their own global brands such as Bunch O Balloons™,
10 X-Shot™, Robo Alive™, Mayka™, Fidget Cube™, Tangle™, ZURU Smashers™, 5
11 Surprise™, and Metal Machines™. The toy industry has recognized these and other Zuru
12 brands with numerous awards and honors. The ZURU Group also has partnerships with
13 entertainment properties, including Nickelodeon, Disney, Universal Studios, and
14 DreamWorks. The ZURU Group now employs hundreds of staff, has numerous offices
15 worldwide, produces hundreds of thousands of toys a day, and supplies most major retailers
16 in more than a hundred countries.



17 As the Compliant notes, Zuru announced the release of the accused Snackles around
18 June 2023. (Complaint, ¶3.) As is evident from the Complaint, Snackles are a co-branding
19 effort with several major snack brands like Hershey's® and Pringles®, and Zuru has long-
20 standing licensing arrangements with these brands.⁶ In contrast to the Squishmallows,
21 Snackles have prominent noses and limbs projecting forwardly from the bodies of the toys
22 and embracing large plush versions of famous branded snacks, which are paired
23 thematically with the toys that are holding them. The essence of the Snackles brand – from
24

25 ⁵ The Court may take judicial notice of the products that Dan-Dee continues to sell.
26 See concurrent Request for Judicial Notice, Exhibit F.

27 ⁶ In fact, Zuru is known among consumers for its co-branding with well-known food
28 brands, such as in its popular Mini Brands™ lineup: <https://zurutoys.com/brands/mini-brands/foodie-mini-brands>.

its very name to its overall appearance – is centered on famous snack foods.

Snackles are sold under a prominent stylized logo reading “ZURU SNACKLES,” that is clearly displayed on product hangtags, store displays, and websites:⁷



⁷ The image of the bin is from Plaintiffs’ Complaint, p.30; the other image is from Zuru’s online listings. See concurrent Request for Judicial Notice.

III. APPLICABLE LAW

A. Rule 12(b)(6)

To survive a motion to dismiss under Rule 12(b)(6), a complaint must “contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A Rule 12(b)(6) motion may be granted when the complaint lacks a cognizable legal theory or sufficient facts to support one. *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). In considering a motion to dismiss, a court need not “accept as true allegations that contradict matters properly subject to judicial notice or by exhibit. Nor is the court required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008) (citing *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001)).

B. Trade Dress

The Lanham Act provides for the protection of trademarks and trade dress used to identify and distinguish a producer’s goods from those manufactured or sold by others and to indicate the source of the goods. *See* 15 U.S.C. § 1127.

In an action for purported infringement of unregistered trade dress, not only is it the plaintiff’s burden to plead non-functionality and secondary meaning as to the claimed trade dress elements, but the plaintiff must also adequately define those trade dress elements. *Greenberg v. Johnston*, No. CV-14-046505-MWF (VBKx), 2014 WL 12586252, at *2 (C.D. Cal. Oct. 22, 2014); *Deckers Outdoor Corp. v. Fortune Dynamic, Inc.*, No. CV 15-769 PSG (SSx), 2015 WL 12731929, at *3 (C.D. Cal. May 8, 2015) (“A plaintiff should clearly articulate its claimed trade dress to give a defendant sufficient notice.”). Without an adequate definition, the defendant is not on proper notice of what does or does not infringe, or what elements of the design are purported to be the subject of the validity and infringement analysis in the case. *Sleep Sci. Partners v. Lieberman*, No. 09-04200 CW, 2010 WL 1881770, at *3 (N.D. Cal. May 10, 2010). This ambiguity can lead to gamesmanship, with the plaintiff changing their definition and characterization of the trade

1 dress to suit their needs over the course of the litigation. *See* 1 J. Thomas McCarthy,
2 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 8:3 (4th ed. 2014) (“there is no
3 reason why the plaintiff cannot define a list of elements...Only then can the court and the
4 parties coherently define exactly what the trade dress consists of and determine whether
5 that trade dress is valid and if what the accused is doing is an infringement.”). On a broader
6 level, the motivation for requiring a clear definition is that “trade dress claims raise a potent
7 risk that relief will impermissibly afford a level of ‘protection that would hamper efforts to
8 market competitive goods.’” *Walker & Zanger, Inc. v. Paragon, Indus.*, 549 F. Supp. 2d
9 1168, 1175-76 (N.D. Cal. 2007) (citations omitted).

10 The plaintiff’s burden increases where trade dress is claimed in a diverse line-up of
11 products. 1 J. Thomas McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION
12 § 8:5.50 (5th ed. 2020) (“[w]hen it is claimed that the trade dress is inherent in an entire
13 series or line of products, the proponent faces the ‘particularly difficult challenge’ of
14 proving the validity of a broadly defined trade dress which is common to all items in the
15 series or line.”); *Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101, 116-17 (2d Cir. 2001) (“a
16 plaintiff seeking to protect its trade dress in a line of products must articulate the design
17 elements that compose the trade dress”); *Maharishi Hardy Blechman Ltd. v. Abercrombie*
18 *& Fitch Co.*, 292 F. Supp. 2d 535, 542 (S.D.N.Y. 2003) (When a plaintiff seeks trade dress
19 protection in a line of products, it must prove that “the trade dress signifies an overall look
20 which is ‘consistent’ throughout the line.”).

21 In *Rose Art Indus. v. Swanson*, 235 F.3d 165, 173 (3d Cir. 2000), the court explained
22 that when trade dress is claimed in a line of products, those products must all have a
23 “consistent overall look” “[b]ecause of the broad reach that protection of trade dress for a
24 series or line of products would embrace...” Although the Ninth Circuit has not specifically
25 addressed the “consistent overall look” test in as many words, district courts in this Circuit
26 have been guided by it because it is self-evident and axiomatic that a claimed trade dress
27 across a product line must have a consistent look in order to evoke a single brand.
28 *Interactive Health LLC v. King Kong United States, Inc.*, No. CV 06-1902-VBF(PLAx),

2008 WL 11337393, at *2 (C.D. Cal. Mar. 6, 2008) (“when a plaintiff seeks protection for an entire line of products, the plaintiff must demonstrate the trade dress signifies an overall look that is consistent throughout the entire line.”) (citing *Yurman* and other cases); *Apple Inc. v. Samsung Elecs. Co.*, 768 F. Supp. 2d 1040, 1048 (N.D. Cal. 2011) (“Although the Ninth Circuit does not appear to have addressed the issue, some circuits have held that where a plaintiff seeks trade dress protection in a line of products, the plaintiff must establish that the line of products has a consistent overall look.”); *Crafty Prods. v. Michaels Cos.*, 389 F. Supp. 3d 876, 882 (S.D. Cal. 2019) (“To grant such far-reaching, undefined trade dress protection [across a product line not having a consistent look] would unfairly allow inventors to claim any broad design and would leave no room for competition.”); *Paramount Farms Int’l LLC v. Keenan Farms Inc.*, No. 2:12-cv-01463-SVW-E, 2012 WL 5974169, at *2-3 (C.D. Cal. Nov. 28, 2012) (distinguishing trade dress in a single product from a line of products in view of *Rose Art*).

In the case of product configuration trade dress, the plaintiff must also plead that the claimed trade dress elements comprise a distinctive aesthetic that, unaided by any unclaimed brand identifiers, would in itself convey a single brand source to most relevant consumers. *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 213 (2000). Evidence of past sales and publicity are only relevant if driven by the trade dress features that are claimed. *Kellytoy Worldwide, Inc. v. TY, Inc.*, No. 20 C 748, 2020 WL 5026255, at *3 (N.D. Ill. Aug. 25, 2020) (“popularity and engagement with a product do not necessarily suggest a connection between the product and its source.”)

With respect to functionality, product features are presumed functional until proven otherwise by the party seeking trade dress protection. *TrafFix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23, 29-30 (2001). The Ninth Circuit test for functionality proceeds in two steps. The Court first inquires whether the product feature is “essential to the use or purpose of the article or if it affects the cost or quality of the article.” *Au-Tomotive Gold, Inc. v. Volkswagen of Am., Inc.*, 457 F.3d 1062, 1067, 1072 (9th Cir. 2006). Generally speaking, the first step looks to utilitarian functionality, *i.e.*, whether or to what extent the

product's appearance is driven by concerns over its ability to perform certain practical functions, and its ease of manufacture. *Id.*

If the product features are not deemed to have utilitarian functional on the first step, the Court proceeds to a second step of inquiring "whether protection of the feature as a trademark would impose a significant non-reputation-related competitive disadvantage." *Au-Tomotive Gold*, 457 F.3d at 1072. This second step generally equates to an assessment of aesthetic functionality, which looks to whether a product feature has become a "stock" element that consumers generally desire and do not associate with a particular brand, such as a heart-shaped box of chocolates. *Id.*; *Goscicki v. Custom Brass & Copper Specialties, Inc.*, 229 F. Supp. 2d 743, 752 (E.D. Mich. 2002) (heart-shaped box).

IV. PLAINTIFFS FAIL TO ADEQUATELY DEFINE PROTECTABLE TRADE DRESS ACROSS THEIR LARGE AND VARIED PRODUCT LINE-UP

A. Plaintiffs' Definition Is Vague And Overreaching

The Court should dismiss Plaintiffs' Lanham Act and state law trade dress claims because they are too vague and overbroad to adequately articulate any cognizable trade dress rights. Plaintiffs make no claim of ownership of any trade dress rights in any one Squishmallow design in isolation. Rather, Plaintiffs' Complaint is premised on something substantially more difficult to prove: that it is the owner of a single broadly defined trade dress encompassing an *entire product category comprising hundreds of different designs*. As shown in the cases cited in Section III.B, and as articulated in *Landscape Forms, Inc. v. Columbia Cascade Co.*, 113 F.3d 373, 380 (2d Cir. 1997):

a trade dress plaintiff seeking to protect a series or line of products faces the particularly difficult challenge of showing that the appearance of its several products is sufficiently distinct and unique to merit protection as a recognizable trade dress. [] Furthermore, a claim of trade dress covering an array of items is likely to be broader than one for an individual product's design. Accordingly, when protection is sought for an entire line of products, our concern for protecting competition is

acute.

Here, the Complaint defines the relevant trade dress elements (“Claimed Elements”) as follows, also using this same language to define the scope of the injunction Plaintiffs ask the Court to impose (Complaint, ¶24; Prayer for Relief Section (a)):

- (1) substantially egg/bell shaped plush toys depicting various similarly shaped fanciful renditions of animals/characters;
- (2) simplified Asian style Kawaii faces with repeating and complementary rounded/oval shaped graphics depicting features on the characters themselves (such as eyes, snouts and bellies) and which conform to and support the overall egg/bell shape of the toys;
- (3) embroidered facial features, such as eyes, nostrils, and/or mouths;
- (4) distinctive contrasting and non-monochrome coloring; and
- (5) short-pile velvety velour-like textured exterior with a light and silky memory foam-like stuffing providing an extremely soft and squeezable marshmallow feel.

Plaintiffs have failed to adequately define any cognizable trade dress that meaningfully encompasses their enormous and highly varied product line-up. Plaintiffs’ vague definition is akin to a car company with a diverse line-up of cars trying to claim rights to non-distinctive and unprotectable elements that are common to all their cars, like “sleek styling” and “soft seats.” Taken literally, Plaintiffs’ Claimed Elements reach far beyond the specific individual toy designs highlighted in their Complaint, and would even sweep up designs Plaintiffs concede do not infringe. As reflected in the Complaint’s Prayer for Relief (which ties back to the Claimed Elements) what Plaintiffs are really seeking via their lawsuit is an overbroad injunction that would impermissibly block Zuru from participating in an entire product category of round, multi-colored, plush animal toys with cartoonish faces. There is no basis in trade dress law for such a sweeping monopoly, nor any plausible basis under *Iqbal/Twombly* to find that Plaintiffs have properly defined protectable trade dress with sufficient specificity and narrowness. *See Nat’l Lighting Co.*,

1 *Inc. v. Bridge Metal Indus., LLC*, 601 F. Supp. 2d 556, 562 (S.D.N.Y. 2009) (“Judicial
2 reluctance to extend trade dress protection to entire product lines is also motivated by this
3 fear of enabling monopolistic behavior”).

4 Whether the alleged trade dress is read line by line, or taken collectively, it is simply
5 too amorphous to state a claim:

6 • ***“Substantially Egg/Bell Shaped Plush Toys...”***

7 As an initial matter, Plaintiffs’ term “substantially egg/bell shaped” does not act as
8 a valid limiter of scope because many of Plaintiffs’ Squishmallows are in fact circular, like
9 the ones below.



19 Secondly, Plaintiffs cannot lay claim to “fanciful renditions of animals/characters,”
20 as that describes virtually any stuffed toy animal. The term “fanciful” is undefined and
21 conclusory.

22 Third, the motif of a stuffed animal/character with an egg shape is a stock
23 aesthetically functional feature dating back to Russian Nesting Dolls that is universally
24 used to convey a smaller “head” atop a larger “body.” As with heart-shaped boxes of
25 chocolate, no one company could monopolize such a common aesthetic.

26 Fourth, it is apparent that a chief motivation for a “substantially egg shape” in the
27 context of these toys is so they can double as rounded pillows, also able to stand on one
28 end so that the animal/character is oriented head up, which are all utilitarian functional

1 considerations.

- 2 • ***“Simplified Asian-style Kawaii faces with Rounded/Oval Shaped Graphics”***

3 Plaintiffs do not define what they mean by “Simplified Asian style Kawaii,” nor is
4 it apparent from looking at the pictures of the Squishmallows, whose appearances are
5 highly varied. Some have circular eyes, some have lines for eyes, some have bellies, some
6 do not have bellies, some have noses, some do not, and so on. The Oxford English
7 Dictionary defines “Kawaii” with sweeping breadth as: “[c]ute, esp. in a manner
8 considered characteristic of Japanese popular culture; charming, darling; ostentatiously
9 adorable.” (See www.oed.com.) Even if “Kawaii” were sufficiently defined in itself, the
10 absence of any consistent look across the product line undercuts the descriptor as-applied.
11 To the extent that Plaintiffs are essentially just claiming simple geometric shapes – like
12 “rounded” “eyes” – those are not distinctive or protectable, and do not even apply to all of
13 Plaintiffs’ products.⁸ *Shelbyco Inc. v. Western Trimming Corp.*, No. 2:97-CV-196C, 1997
14 WL 377982, at *4 (D. Utah. May 12, 1997) (“[T]he only consistent feature in [plaintiff’s]
15 trade dress is the display of commonplace, ordinary shapes in various colors.”).

16 As explained in *Walker & Zanger, Inc. v. Paragon, Indus.*, 549 F. Supp. 2d 1168,
17 1176 (N.D. Cal. 2007):

18 plaintiff resorts to empty generalities in the face of more precise
19 alternatives. For instance, to describe the colors of the trade dress,
20 plaintiff should list the actual colors rather than claim a ‘palette of
21 colors reminiscent of Provence.’ Or instead of defining the three-
22 dimensional relief as ‘complex,’ plaintiff should provide the magnitude
23 and angle of relief that render plaintiff’s tiles distinctive.

24 Here, as in *Walker*, Plaintiffs have resorted to “empty generalities.” *See also Sara*

26 ⁸ Nor is it plausible that Plaintiffs could claim rights in the Kawaii style, as this is an
27 aesthetic that originated from Japan that pre-dates Squishmallows. Plaintiffs cannot simply
28 appropriate as their own an entire preexisting style: Plaintiffs can no more claim
distinctiveness as to Kawaii style than they could to Anime.

1 *Designs, Inc. v. A Classic Time Watch Co.*, 234 F. Supp. 3d 548, 555 (S.D.N.Y. 2017)
2 (high level descriptions like “gradient chain” were inadequate).

3 • ***“Embroidered Facial Features”***

4 It is virtually axiomatic that stuffed animal toys have embroidered facial features.
5 Not only is this feature wholly generic and non-distinctive, but it is also legally functional,
6 as embroidery is one of the most common means to apply facial features to stuffed animals.

7 • ***“Distinctive Contrasting and Non-monochrome Coloring”***

8 Read literally, the phrase means nothing more than that the toys are multi-colored.
9 The adjective “distinctive” is just conclusory, given that the phrase as a whole fails to
10 explain what is distinctive about the color pattern. Having a stuffed animal be “multi-
11 colored” is just a generic and aesthetically functional attribute that cannot be protectable.

12 Furthermore, even among Squishmallows, many use the same color tones, such as
13 those below (from Exhibit A):



21 • ***“Short-pile velvety velour-like...and squeezable marshmallow feel”***

22 A substantial percentage of all stuffed animal toys could be described this way, so
23 the phrase does not add anything to the overall definition. Soft texture and squeezability
24 are utilitarian functional features that could not be protectable. Just as a car company could
25 not claim a trade dress in “rubbery round tires,” Plaintiff cannot enhance their definition of
26 trade dress by adding plainly unprotectable features. *See, e.g., Wallace Int’l Silversmiths,*
27 *Inc. v. Godinger Silver Art Co.*, 916 F.2d 76, 81 (2d Cir. 1990) (finding that the plaintiff
28

sought trade dress protection “not for a precise expression of a decorative style, but for basic elements of a style that is part of the public domain”).

Plaintiffs may argue that even if the Claimed Elements are unprotectable in isolation, the combination of them defines a valid trade dress. This argument also fails because the Complaint does not demonstrate how the combination of the Claimed Elements adds up to anything more than the sum of their parts. While it is true that sometimes unprotectable elements can be arranged in an aesthetically distinctive and non-functional way (like stacking building blocks into an artistic sculpture), the Ninth Circuit has also made clear that when the whole of trade dress is nothing more than assemblage of unprotectable elements combined in a predictable way, “it is semantic trickery to say that there is still some sort of separate ‘overall appearance’” that is protectable. *Leatherman Tool Grp., Inc. v. Cooper Indus.*, 199 F.3d 1009, 1013 (9th Cir. 1999); *see also Jeffrey Milstein, Inc. v. Greger, Lawlor, Roth, Inc.*, 58 F.3d 27, 32 (2d Cir. 1995) (“the fact that a trade dress is composed exclusively of commonly used or functional elements might suggest that that dress should be regarded as unprotectable or ‘generic,’ to avoid tying up a product or marketing idea.”).

When boiled down to their essence, all that the Claimed Elements define in combination is a roundish stuffed animal toy with multiple colors and an embroidered cartoonish face. Taken together, these elements do not yield any protectable whole, but rather just broadly describe attributes of innumerable stuffed toy products that no one company could plausibly monopolize. *Landscape Forms, Inc. v. Columbia Cascade Co.*, 113 F.3d 373, 382 (2d Cir. 1997) (“If the law protected style at such a level of abstraction, Braque might have prevented Picasso from selling cubist paintings”).

Nor do the various photographs supplied in the Complaint assist the Claimed Elements because “courts cannot be expected to distill from a set of images those elements that are common to a line of products and both distinctive and non-functional.” *Mike Vaughn Custom Sports, Inc. v. Piku*, 15 F. Supp. 3d 735, 747 (E.D. Mich. 2014) (dismissing claims to trade dress in an entire product line up of hockey gear). Here, Plaintiffs’

1 Complaint does not adequately convey the true scope and diversity of the Squishmallows
2 product line, and even as among the pictures in the Complaint, it is apparent that there is
3 no distinctive and protectable feature of the toys that is consistent across the whole line.

4 One of the several negative consequences of the overbreadth of Plaintiffs' definition
5 is that it makes it impossible to differentiate between stuffed animals that would be deemed
6 infringing and those that would not be. Indeed, the Claimed Elements on their face extend
7 to the products sold by Dan-Dee and Ty that Plaintiffs had previously accused of
8 infringement before withdrawing their claims and dismissing with prejudice. Those
9 dismissals would bar future infringement claims against such toys under principles of res
10 judicata. Despite this, Plaintiffs now persist in asserting a trade dress definition that
11 includes those non-infringing toys. Such a definition is overreaching and cannot fairly put
12 Zuru on notice of the parameters of Plaintiffs' claimed rights.

13 Nor should it be assumed that there ultimately is a way to properly define trade dress
14 rights in Squishmallows. Where trade dress is claimed in a product line, "[t]he elements
15 specified as the trade dress must be present in every item in that product line." *R.F.M.A.S.,*
16 *Inc. v. So*, 619 F. Supp. 2d 39, 77 (S.D.N.Y. 2009); *see also Nat'l Lighting Co., Inc.*, 601
17 F. Supp. 2d at 562 (dismissing under Rule 12(b)(6) where "plaintiff was unable to identify
18 which of the twelve listed design elements are consistent throughout the entire product line
19 or how specifically the claimed trade dress incorporates those common elements"). The
20 moment that Plaintiffs made the marketing decision to have hundreds (perhaps thousands)
21 of highly varied product designs – both in terms of very different looking characters, and
22 in terms of different structural variations – they forfeited the ability to use trade dress law
23 to encompass the entire line-up. For purposes of this Motion, at least, the Claimed Elements
24 do not suffice as a trade dress definition.

25 Returning to the fact that Plaintiffs do not appear to have attempted to obtain any
26 federal registration for the purported Squishmallows trade dress, this can serve as a litmus
27 test for the sufficiency of the trade dress definition. The Trademark Office requires that
28 applicants supply a drawing or image of the claimed trade dress that adequately and

specifically puts the public on notice of the design that is claimed. *See* 37 C.F.R. §2.52; Trademark Manual of Examining Procedure (“TMEP”) §1202.02(c) – (c)(i). In the case of products that are part of a varied line-up, a single unifying feature may be claimed in solid lines, with variable features shown in dashed lines. *Id.* For example, a car company might seek trade dress protection in the design of a particular front grill used on many different cars, showing it in solid lines and the rest of the car in dashed lines. In the case of Squishmallows, however, it is unclear how Plaintiffs could ever come up with any drawing based on their Claimed Elements that could satisfy regulatory notice requirements. Because there in fact are no common identifying features across the Squishmallows product line, any attempt to represent them visually would devolve into a collection of amorphous dashed lines. If a claimed trade dress is so abstract and so varied across a product line that it could not be feasibly depicted in a federal registration, it must be rejected.

B. This Court’s Past Rulings On Squishmallows Trade Dress

To Zuru’s knowledge, this will be the third time that a Central District of California court has been asked to rule on the sufficiency of Plaintiffs’ purported trade dress definition for Squishmallows. In a September 23, 2019 ruling in the *Dan-Dee* Case, Judge Kronstadt granted dismissal for many of the same reasons that Zuru now advances (though Zuru has also asserted additional arguments not considered in *Dan-Dee*). In a December 4, 2019 ruling in *Kellytoy Worldwide, Inc. v. Hugfun Int’l, Inc.*, Judge Fitzgerald – who, remarkably, was never informed by Plaintiffs of the *Dan-Dee* decision from just a few months earlier – granted dismissal on other grounds, but found the trade dress definition adequate. No. CV-19-07652-MWF, 2019 WL 8064073, at *4-6 (C.D. Cal. Dec. 4, 2019). There are compelling reasons why *Dan-Dee* is more persuasive than *Hugfun*, and why *Hugfun* is otherwise distinguishable from the present case, in which Zuru is presenting new arguments.

Although the trade dress definition in *Dan-Dee* contained fewer words than the definition that Plaintiffs now advance, it was functionally the same:

(1) substantially bell-shaped plush toys embodying fanciful renditions

1 of animals/characters, (2) embroidered anime-inspired minimalist,
2 whimsical facial features, (3) a velvety velour-like textured exterior,
3 and (4) stuffing with a light ‘marshmallow,’ memory foam-like texture.

4 (Dan-Dee Order, Ciardullo Ex. 1, p.2.)

5 It is appropriate for the Court to approach Plaintiffs’ latest version of the trade dress
6 definition in the same way as the *Dan-Dee* court because Plaintiffs’ additions to the
7 definition do not actually convey any new meaning. For example, Plaintiffs have included
8 the phrase “Asian style Kawaii” without defining it, and in looking at all the pictures of
9 Squishmallows, it is apparent that they have highly varied faces. Plaintiffs also add the
10 word “non-monochromatic,” which is just a fancy way of saying that the toys have more
11 than one color, but such is true of most stuffed animal toys. Plaintiffs add the phrase
12 “repeating and complementary,” but it is unclear what this means, or how it is even
13 reflected across all of the diverse Squishmallows. Likewise, the words “eyes,” “snouts,”
14 mouths,” “nostrils,” and “bellies” do not add anything since most stuffed animals have
15 such features.

16 In dismissing the trade dress claims in *Dan-Dee*, the Court ruled: “This general
17 description offers little insight into the scope or nature of Kellytoy’s claim. [] It is also too
18 broad to form the basis of a plausible claim for trade dress infringement. ...in light of the
19 substantial differences among the designs of the products in the Squishmallows line, the
20 images included in the FAC do not provide the level of clarity about the nature and scope
21 of the claimed trade dress as is required by the caselaw. The images do not sufficiently
22 show or explain what about the design of the Squishmallows is claimed as the basis for
23 trade dress protection. Accordingly, the cause of action for federal trademark infringement
24 is not pleaded sufficiently.” (Dan-Dee Order, Ciardullo Ex. 1, p.9.)

25 Plaintiffs may argue that this Court should follow *Hugfun* over *Dan-Dee* because the
26 trade dress definition in *Hugfun* was the more wordy one that is also used in the present
27 Complaint. However, there are numerous reasons why this Court should reach a different
28 result. To start, the *Hugfun* ruling is clouded by the fact that neither litigant ever informed

1 the court of the *Dan-Dee* ruling from only a few weeks earlier,⁹ despite such disclosure
2 being ethically required of Plaintiffs' former legal counsel pursuant to their Duty of
3 Candor. *See* California Rule of Professional Conduct 3.3(a)(2): "A lawyer shall not fail to
4 disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer
5 to be directly adverse to the position of the client and not disclosed by opposing counsel...".
6 The *Hugfun* ruling anomalously makes no mention of *Dan-Dee*, and since the motion was
7 decided only on the papers (*see Hugfun* at *2), it appears that the court never had the
8 opportunity to consider *Dan-Dee*.

9 Further hampering the Court was the fact that the litigants failed to appropriately
10 convey the sheer numerosity and variety of different-looking Squishmallows.¹⁰ The
11 movant also failed to address the different burden in pleading trade dress in a large line-up
12 of products rather than a single product, and so the court never addressed this important
13 distinction. More generally, the movant did not present the court with many of the
14 arguments that Zuru now presents in this Motion. Finally, there have been important
15 intervening facts: Plaintiffs have since withdrawn infringement claims against Ty and Dan-
16 Dee that otherwise fall within the scope of the trade dress definition. This new development
17 renders Plaintiffs' trade dress definition inherently vague and inconsistent with legal
18 positions that have now become res judicata.¹¹

19
20 ⁹ *See* briefing at C.D. Cal. Case No. 2:19-cv-07652, Dkts. 13, 19, and 21.

21 ¹⁰ The Court did observe language in the Complaint to the effect that Squishmallows
22 comprise "a broad range of plush toys" (*Hugfun* at *3), but the Court was not otherwise
23 aware of what these were or their surprising numerosity.

24 ¹¹ Plaintiffs may point to the ruling from the Illinois court in the Ty Case in which,
25 despite denying Plaintiffs' motion for a preliminary injunction, the court stated briefly in
26 conclusory fashion that "the court cannot say that Kellytoy's description fails to put Ty on
27 notice of the contours of its claimed trade dress." Ty Case, 2020 WL 5026255, at *3 (N.D.
28 Ill. Aug. 25, 2020). This non-substantive assessment from a district court in a different
circuit should not be given much weight.

V. **PLAINTIFFS SHOULD CONFIRM THE ORIGIN OF THE**
“COPYRIGHTED WORKS” IMAGES

The Complaint contains a table on Pages 12-13 in which the left column has a heading that reads “Copyrighted Works” above a collection of photographs, while the right hand column purports to have corresponding copyright registration numbers. However, the Complaint contains no allegation that the toys in the photos of the “Copyrighted Works” are the same as the toys whose images were submitted in the deposit copies to the Copyright Office. Put another way, the Complaint provides no assurance that the photos of the “Copyrighted Works” might not be images of some other toys (or versions of toys) that are different than the toys that are actually the subject of the copyright registrations. As explained in *Parker v. Hinton*, No. 22-5348, 2023 WL 370910, at *4 (6th Cir. Jan. 24, 2023):

...a copyright protects original material to the extent it is contained in the deposit copy. Copyright Office Compendium § 504 (3d ed. 2017) (“As a general rule, a registration for a work of authorship covers the entire copyrightable content of the authorship that (i) is claimed in the application, (ii) is owned by the claimant, and (iii) is contained in the deposit copy(ies).” (emphasis added)). Thus, a plaintiff must use the deposit copy to establish the ownership component of a copyright infringement claim.

When the parties met and conferred on this issue, Plaintiffs were unclear as to the origin of the photos that purport to reflect the “Copyrighted Works.” (Ciardullo Decl. ¶2.) The Copyright Office does not maintain easily accessible records of deposit copies, so Zuru cannot simply look them up online as it would, for example, to see the prosecution history of a patent. Plaintiffs are uniquely in possession of the deposit copy records. While Zuru could ultimately get those records several months from now as part of discovery, Zuru would be “flying blind” until then, uncertain of what the actual toys in the deposit copy images look like, and thus not on sufficient notice of the copyright claim to be able to

1 prepare its defenses. If Plaintiffs are unwilling or unable to allege and show what the
2 copyright deposit copies consist of via amendment, the copyright claim is not properly
3 stated because it is the copyright deposit copy that controls the scope of any protection (and
4 not random photographs). *See Williams v. Bridgeport Music, Inc.*, No. LA CV13-06004
5 JAK (AGRx), 2014 WL 7877773, at *9 (C.D. Cal. Oct. 30, 2014) (“the deposit copy or a
6 comparable writing defines the scope of what is protected”). Plaintiffs should be required
7 to amend (if they can) to clarify whether the images shown as the “Copyrighted Works” in
8 the Complaint depict the same toys as are shown in the deposit copies at the Copyright
9 Office, or if they are not, Plaintiffs should supply such images as part of an amended
10 pleading.

11 **VI. UNOPPOSED GROUNDS**

12 **A. Lack Of Standing**

13 In order to have standing to assert a copyright claim, the plaintiff must be either the
14 owner or exclusive licensee of the copyrights at issue. *Silvers v. Sony Pictures Entm't, Inc.*,
15 402 F.3d 881, 887-8 (9th Cir. 2005); *Roblox Corp. v. Wowwee Grp. Ltd.*, 2023 WL
16 2433970, *10-11 (N.D. Cal. Mar. 9, 2023). Here, the Complaint provides no basis for how
17 any Plaintiff other than Kelly Toys Holdings LLC would have standing under the
18 Copyright claims. (Complaint, ¶14.) In meeting and conferring on this point, Plaintiffs
19 indicted that they did not oppose the argument. (Ciardullo Decl. ¶ 2.) Though not part of
20 this Motion, Zuru reserves the right to challenge Lanham Act standing as the case proceeds.

21 **B. Copyright Preemption**

22 State law claims are preempted and must be dismissed to the extent that they seek to
23 vindicate claimed rights that are the same as those already protected by Copyright law.
24 *Lanard Toys Ltd. v. Novelty Inc.*, 511 F. Supp. 2d 1020, 1030–31 (C.D. Cal. 2007);
25 *Aquawood, LLC v. Toys “R” Us-Delaware, Inc.*, No. 215CV05869ABMRWX, 2016 WL
26 10576620, at *3 (C.D. Cal. Mar. 10, 2016). Here, Plaintiffs’ claim under Section 17200 is
27 partially based on the assertion of infringement of the alleged copyrighted works.
28 (Complaint, ¶102, referring to the “Squishmallows Works.”) Although Plaintiffs’ Fourth

1 Cause of Action under California common law does not expressly reference copyrights,
2 the Prayer for Relief at Section (f) seeks judgment that the alleged copyright infringement
3 constitutes a violation under the common law. Zuru thus requests that all state law claims
4 be dismissed-in-part to the extent premised on any assertion of copyrights. In meeting and
5 conferring on this point, Plaintiffs indicated that they did not oppose the argument that the
6 state law claims cannot be premised on copyright.

7 **VII. CONCLUSION**

8 Zuru requests that the Court grant dismissal of Plaintiffs' claims for the reasons set
9 forth above.

10
11 DATED: December 22, 2023

FOLEY & LARDNER LLP

12 /s/ Jean-Paul Ciardullo

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WORD COUNT CERTIFICATION

I hereby certify that, according to Microsoft Word's Word Count function, the foregoing Memorandum is less than 7,000 words.

/s/ Jean-Paul Ciardullo
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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION**

KELLY TOYS HOLDINGS, LLC;
JAZWARES, LLC; KELLY
AMUSEMENT HOLDINGS, LLC; and
JAZPLUS, LLC,

Plaintiffs,

vs.

ZURU, LLC,

Defendant.

Case No. 2:23-cv-09255-MCS(AGRx)

Hon. Mark C. Scarsi

**PLAINTIFFS' OPPOSITION TO
ZURU LLC'S MOTION TO DISMISS**

Date: February 26, 2024

Time: 9:00 a.m.

Courtroom: 7C

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1 **I. INTRODUCTION AND BACKGROUND**

2 Plaintiffs’ Squishmallows toys have skyrocketed to fame, topping sales charts
3 and rapidly becoming coveted collectors’ items. They have been described by the
4 *Washington Post* as “the hottest toy on the market,” (ECF 1, “Compl.” ¶ 34) and have
5 surpassed other well-known mega brands like Lego and Hot Wheels to become the
6 most popular toy brand in the country. (*Id.* ¶ 38.) Squishmallows’ meteoric rise is
7 further demonstrated through its online popularity, with branded videos being viewed
8 more than 11 billion times on TikTok. (*Id.* ¶ 31.) Put simply, consumers love
9 Squishmallows. (*Id.* ¶ 1.)

10 In a crowded toy market with many available plush toys, Squishmallows has
11 become a runaway success with a distinctive look. As described in paragraph 24 of
12 the Complaint (the “Identified Trade Dress”), the popular trade dress associated with
13 many Squishmallows is a fanciful rendition of a unique animal with simplified Asian
14 style Kawaii faces in an egg/bell shape in combination with other features that create
15 a distinguishing aesthetic look. Due to the immense popularity of the toys, the look
16 associated with this trade dress has grown synonymous with the Squishmallows brand.
17 (*Id.* ¶¶ 28-39.)

18 Witnessing Plaintiffs’ success with Squishmallows in the toy market, competing
19 toy company Defendant Zuru, LLC (“Zuru”) decided to release products that copy the
20 Asserted Trade Dress. (*Id.* ¶¶ 42-46.) In June 2023, Zuru launched “Snackles,” a line
21 of plush toys that undeniably seeks to usurp the benefits and trade off of the reputation
22 and goodwill of the Plaintiffs’ Identified Trade Dress:

Plaintiffs' Original Products	Zuru's Infringing Products
	
	
	

(*Id.* ¶ 43.) Indeed, there is already substantial *actual* evidence of consumer confusion between Plaintiffs' Squishmallows and Zuru's Snackles. (*Id.* ¶¶ 47-60.) For example, consumers have remarked about Zuru's Snackles: "They look like Squishmallows"; "yo, these look like squishmallows"; "Literally a rip off of squishmallows"; "they're 100% trying to trick ppl like your partner"; and "Zuru jumping on the Squishmallows train five years too late." (*Id.* ¶¶ 55, 57.)

Plaintiffs thus filed this case against Zuru to stop the ongoing infringement of the Identified Trade Dress; end the infringement of the copyrighted Squishmallows (*id.* ¶¶ 27, "Copyrighted Works"); and recover damages due to the substantial harm caused by Zuru (*id.* ¶¶ 58-59).

1 In response, Zuru filed a motion to dismiss (“Motion”) that does not challenge
2 *any* of the substantive allegations of copyright infringement. Nor does Zuru argue in
3 the Motion that Plaintiffs have not sufficiently pleaded the required elements of trade
4 dress infringement: non-functionality nature of the *overall* trade dress; secondary
5 meaning; and likelihood of confusion. *See Clicks Billiards v. Sixshooters, Inc.*, 251
6 F.3d 1252, 1258 (9th Cir. 2001) (listing these elements as the three elements required
7 to establish trade dress infringement).

8 Instead Zuru claims that Plaintiffs have not sufficiently *identified* their trade
9 dress because it opines that certain elements of the Asserted Trade Dress are not
10 protectable. Zuru’s arguments must be rejected for four reasons.

11 *First*, Zuru’s argument that Plaintiffs must exhaustively explain the meaning of
12 every word of every element of the Asserted Trade Dress is premature at the motion
13 to dismiss stage. As Judge Wu held in *Therabody, Inc. v. DJO, LLC*, there are no
14 “published Ninth Circuit or Supreme Court decision identifying [the exhaustive
15 identification of the asserted trade dress] as a pleading requirement for such claims.”
16 2022 WL 17360133, at *2 (C.D. Cal. June 1, 2022). Instead, the plaintiff need only
17 plead the three elements required to state a trade dress claim as outlined by Ninth
18 Circuit precedent. *Click Billiards*, 251 F.3d at 1258. Since Zuru “offers no proper
19 argument that any of these elements are missing from Plaintiff[s]’ allegations,” its
20 motion to dismiss must be denied. *Therabody*, 2022 WL 17360133, at *2.

21 *Second*, even if Plaintiffs were required to identify the specific trade dress-at-
22 issue, they have met the low bar to identify the trade dress at the pleading stage. Courts
23 that examine trade dress descriptions at the pleading stage allow them to proceed “[s]o
24 long as a plaintiff has alleged a complete recitation of the concrete elements of its
25 alleged trade dress.” *Lepton Labs, LLC v. Walker*, 55 F. Supp. 3d 1230, 1240 (C.D.
26 Cal. 2014). It can do so by both describing the trade dress in words (*id.*); with pictures;
27 or with both in combination with one another. *See Deckers Outdoor Corp. v. Fortune*
28 *Dynamic, Inc.*, 2015 WL 12731929, at *4 (C.D. Cal. May 8, 2015) (finding trade dress

properly alleged where plaintiffs alleged “the elements of a trade dress and provid[ed] an image of a product”). Plaintiffs here have done both: identified the five elements of the Asserted Trade Dress *and* provided images of the Squishmallows products that practice that trade dress. (Compl. ¶ 24.) Courts routinely deny motions to dismiss where a plaintiff has provided an exhaustive list of the elements of its asserted trade dress. *See, e.g., Lepton Labs*, 55 F. Supp. 3d at 1240 (denying motion to dismiss).

Third, in arguing that the Asserted Trade Dress is not protectable, Zuru focuses on *individual terms and words in individual elements* of the overall asserted design. This is contrary to law. As controlling Ninth Circuit authority holds, an asserted trade dress “must be examined as a whole, not by its individual constituent parts.” *Click Billiards*, 251 F.3d at 1259. Zuru’s arguments that *some* parts of the Asserted Trade Dress may be functional or non-distinctive are thus irrelevant and cannot justify granting a motion to dismiss. *Id.* (“It is crucial that [courts] focus *not* on the individual elements, but rather on the overall visual impression that the combination and arrangement of those elements create.”). And, in any event, Zuru’s claim that the Court should undertake fact-intensive inquiries about genericness, distinctiveness, and functionality based on exhibits outside of the Complaint¹ is inappropriate at the motion to dismiss stage when the Court must assume Plaintiffs’ allegations as true. *Lepton Labs*, 55 F. Supp. 3d at 1237 (courts “must construe all factual allegations set forth in the complaint as true and in the light most favorable to the plaintiff” (cleaned up)).

¹ As discussed in the accompanying Opposition to Zuru’s Request for Judicial Notice, Zuru improperly relies on exhibits in its Motion that are neither incorporated by reference in the Complaint, nor otherwise proper subjects of judicial notice. And it also, in violation of Ninth Circuit precedent, asks this Court to assume the truth of its extraneous exhibits to grant its motion to dismiss. *See Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 1002 (9th Cir. 2018) (“Submitting documents not mentioned in the complaint to create a defense is nothing more than another way of disputing the factual allegations in the complaint,” while failing to give the plaintiff an “opportunity to respond to the defendant’s new version of the facts.”). The Court should decline to do so.

1 *Fourth*, both courts that have considered the Asserted Trade Dress have found
2 it to be sufficient at the pleading stage. In *Kellytoy Worldwide, Inc. v. Hugfun Int'l,*
3 *Inc.*, Judge Fitzgerald held that the Asserted Trade Dress “satisfies the requirements
4 of Rule 8” because it “describes the [t]rade [d]ress in detail and attaches photos of its
5 line of plush toys.” 2019 WL 8064073, at *4 (C.D. Cal. Dec. 4, 2019). Likewise, in
6 *Kellytoy Worldwide, Inc. v. Ty, Inc.*, the court rejected the *same arguments* Zuru
7 presents here, holding that the Asserted Trade Dress is enough to put the defendant
8 “on notice of the contours of its claimed trades” to proceed to discovery. 2020 WL
9 5891386, at *2 (N.D. Ill. Oct. 5, 2020). This Court should do the same.

10 Finally, Zuru also requests that Plaintiffs provide the original deposit images of
11 the Copyrighted Works with the Complaint. Yet Zuru cites no law requiring that
12 Plaintiffs do so at the pleading stage. This argument, like Zuru’s argument about the
13 trade dress description, is yet another attempt to insert fact disputes at the pleading
14 stage. Plaintiffs respectfully request that the Court deny Zuru’s Motion in its entirety.

15 **II. LEGAL STANDARD**

16 A court may only grant dismissal under Federal Rule of Civil Procedure
17 12(b)(6) if the plaintiff fails to present a cognizable legal theory or to allege sufficient
18 facts to support a cognizable legal theory. *Mendiondo v. Centinela Hosp. Med. Ctr.*,
19 521 F.3d 1097, 1104 (9th Cir. 2008). In assessing a motion to dismiss, “a judge must
20 accept as true all of the factual allegations contained in the complaint.” *Erickson v.*
21 *Pardus*, 551 U.S. 89, 94 (2007). To survive a Rule 12(b)(6) motion, a complaint need
22 only “contain sufficient factual matter, accepted as true, to ‘state a claim to relief that
23 is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell*
24 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

1 **III. ARGUMENT**

2 **A. Plaintiffs’ Description of the Identified Trade Dress is Sufficient at**
3 **the Pleading Stage**

4 “Trade dress refers generally to the total image, design, and appearance of a
5 product and may include features such as size, shape, color, color combinations,
6 texture or graphics.” *Clicks Billiards*, 251 F.3d at 1257-58 (cleaned up). “To sustain
7 a claim for trade dress infringement, [a plaintiff] must prove: (1) that its claimed dress
8 is nonfunctional; (2) that its claimed dress serves a source-identifying role either
9 because it is inherently distinctive or has acquired secondary meaning; and (3) that the
10 defendant's product or service creates a likelihood of consumer confusion.” *Id.*

11 Here, Zuru does not directly challenge functionality, secondary meaning, nor
12 the likelihood (and substantial actual evidence of) consumer confusion. (*See generally*
13 ECF 23.) It instead focuses exclusively on whether Plaintiffs’ *trade dress description*
14 is sufficient to proceed to discovery. (*Id.* at 13 (“Plaintiffs Fail to Adequately Define
15 Protectable Trade Dress”).)

16 Zuru’s arguments fail for four reasons: (1) there is no requirement to identify a
17 specific trade dress definition at the pleading stage; (2) Plaintiffs’ Identified Trade
18 Dress provides sufficient notice of the asserted trade dress; (3) Zuru’s arguments are
19 meritless and, in any event, present fact disputes not ripe for adjudication at this stage;
20 and (4) every court to consider Plaintiffs’ Identified Trade Dress has found it sufficient
21 at the pleading stage.

22 1. There is No Legal Requirement for Plaintiffs to Detail Every
23 Element of a Protectable Trade Dress at the Pleading Stage

24 Zuru argues that the Identified Trade Dress is “too vague and overbroad to
25 adequately articulate any cognizable trade dress rights.” (ECF 23 at 13.) This
26 argument improperly assumes that, at the pleading stage, a plaintiff must plead, and a
27 court must assess, all elements of its trade dress. The law is otherwise.

Judge Wu’s decision in *Therabody* is directly on point. There, the defendant argued, as Zuru does here, that “to state a claim for trade dress infringement, a plaintiff must first identify the trade dress at issue.” 2022 WL 17360133, at *2. But, as Judge Wu held, neither the parties nor the Court “located any published Ninth Circuit or Supreme Court decision identifying this as a pleading requirement for such claims.” *Id.* Instead, the plaintiff need only plead non-functionality, secondary meaning, and likelihood of confusion. *Id.* If the plaintiff does so, the trade dress claim proceeds beyond the pleading stage and “[t]o the extent [d]efendant believes there is a problematic uncertainty in [p]laintiff’s trade dress claims beyond those required allegations, that is one permissible aim of discovery.” *Id.*

The same analysis applies here. Plaintiffs have sufficiently pleaded non-functionality (Compl. ¶ 25); secondary meaning (*id.* ¶¶ 28-39); and likelihood of confusion (*id.* ¶¶ 47-57.) Zuru does not challenge the sufficiency of these allegations.² (*See generally* ECF 23.) Accordingly, Plaintiffs’ trade dress claims must proceed to discovery and Zuru’s motion to dismiss should be denied. *Therabody*, 2022 WL

² Zuru’s only references to the functionality are in the context of disputing *some individual* elements of the Identified Trade Dress. (*See, e.g.*, ECF 23 at 15 (“egg shape is a stock aesthetically functional feature”); *id.* at 17 (“embroidered facial features” are “legally functional”).) Zuru never addresses Plaintiffs’ detailed allegations establishing the functionality of the, as required under the law, *overall trade dress* in paragraph 25 of the Complaint. (*Id.*) *See Clicks Billiards*, 251 F.3d at 1259 (holding that “in evaluating functionality,” courts must “focus not on the individual elements, but rather on the overall visual impression that the combination and arrangement of those elements create”) And even if Zuru had challenged the functionality of the overall trade dress, courts routinely hold that whether “trade dress is functional or nonfunctional is a factual one that cannot be resolved on a motion to dismiss.” *DocMagic, Inc. v. Ellie Mae, Inc.*, 745 F. Supp. 2d 1119, 1141 (N.D. Cal. 2010); *Fuddruckers, Inc. v. Doc’s B.R. Others, Inc.*, 826 F.2d 837, 843 (9th Cir. 1987) (“Functionality is a question of fact.”); *Mosaic Brands, Inc. v. Ridge Wallet LLC*, 2021 WL 922074, at *4 (C.D. Cal. Jan. 7, 2021) (“Defendant primarily argues that the elements of the [] trade dress are functional [], but whether the elements are functional are factual issues that the Court cannot resolve at the motion to dismiss stage.”).

1 17360133, at *2 (denying motion to dismiss trade dress claims for failure to identify a
2 trade dress).

3 2. Plaintiffs Have Provided Sufficient Notice of Their Trade Dress

4 Even if it were required, Plaintiffs have provided a sufficient recitation of the
5 trade dress at issue under the standard employed by courts who have examined the
6 trade description at the pleading stage.

7 District courts in the Ninth Circuit hold that “[s]o long as a plaintiff has alleged
8 a complete recitation of the concrete elements of its alleged trade dress, it should be
9 allowed to proceed.” *Lepton Labs*, 55 F. Supp. 3d at 1240. Even if “[a] defendant
10 may very well believe that a [trade dress description] does not make out a claim for
11 protectable trade dress,” “granting a dismissal motion based upon that belief would
12 turn the litigation process on its head.” *Id.* The time to test the “legal merits” of the
13 trade dress description is “at summary judgment or trial when the parties provide with
14 all relevant, admissible evidence—not at the pleading stage when the court has little
15 more than the plaintiff’s allegations and the defendant’s summary denial of them.” *Id.*

16 Here, Zuru does not dispute that Plaintiffs have pleaded a complete recitation of
17 the concrete elements of the Identified Trade Dress. (ECF 23 at 14 (admitting that
18 “the Complaint defines the relevant trade dress elements”).) Indeed, Plaintiffs include
19 both the elements of its Identified Trade Dress and *pictures* of the relevant products.
20 (Compl. ¶ 24.) They also include pictures of the *infringing* products side-by-side with
21 Plaintiffs’ products. (*Id.* ¶ 43.) This is sufficient at the pleading stage. *See, e.g., R&A*
22 *Synergy LLC v. Spanx, Inc.*, 2019 WL 8137706, at *2 (C.D. Cal. Sept. 4, 2019)
23 (holding that the plaintiff provided a “plausible claim for trade dress infringement”
24 where it “has identified specific designs that are allegedly being infringed [] and has
25 pleaded exhibits providing a visual comparison of the allegedly infringing designs”);
26 *Deckers*, 2015 WL 12731929, at *4 (“[The] listing [of] the elements of a trade dress
27 and providing an image of a product bearing the dress sufficiently identifies the trade
28 dress over which [Plaintiffs claim] exclusive rights.”); *IMEX Leader, Inc. v. Zest US*

1 *Wholesale, Inc.*, 2023 WL 2626968, at *6 (C.D. Cal. Feb. 15, 2023) (trade dress
2 description was sufficient where the alleged trade dress consisted of “nonfunctional
3 artwork, designs, various character names and faces, and/or art depicting stories on . . .
4 egg-shaped containers,” and plaintiff “provide[d] a multitude of images and
5 examples”).

6 Zuru’s gripe is instead with the *merits* of the Identified Trade Dress, arguing
7 that it is somehow both too narrow and too broad. (ECF 23 at 14 (arguing both that
8 the description “reach[es] far beyond the specific individual toy designs highlighted in
9 their Complaint” and does not “encompass their enormous and highly varied product
10 line-up”).) Yet Zuru does not cite a *single published case* from the Ninth Circuit that
11 dismissed trade dress claims at the pleading stage based on the alleged deficiencies in
12 a description that includes exhaustive elements of an asserted trade dress. (ECF 23 at
13 16 (citing *Walker & Zanger, Inc. v. Paragon Indus., Inc.*, 549 F. Supp. 2d 1168, 1175-
14 76 (N.D. Cal. 2007) (granting a motion for *summary judgment* and only after
15 examining “the evidence submitted by the parties,” including a 30(b)(6) deposition));
16 *id.* at 12 (citing *Paramount Farms Int’l, LLC v. Keenan Farms Inc.*, 2012 WL
17 5974169, at *3 (C.D. Cal. Nov. 28, 2012) (denying defendant’s *summary judgment*
18 argument because “Plaintiff is only seeking trade protection over the bins that bear the
19 five indicia of the Claimed Trade Dress”); *Crafty Prods., Inc. v. Michaels Cos., Inc.*,
20 389 F. Supp. 3d 876, 881-83 (S.D. Cal. 2019) (dismissing and providing leave to
21 amend where, unlike here, plaintiff did not include an exhaustive list of elements and
22 instead claimed their trade dress encompassed “all of the designs and products
23 depicted” in exhibits); *Apple Inc. v. Samsung Elecs. Co., Ltd.*, 768 F. Supp. 2d 1040,
24 1048 (N.D. Cal. 2011) (denying motion to compel expedited discovery because “a
25 plaintiff generally is permitted to define a product line as it sees fit” (cleaned up))).³
26

27 ³ The unpublished cases Zuru cites from the Ninth Circuit likewise do not help Zuru
28 because they either involve vastly different facts, were summary judgment orders,
(Continued...)

1 Instead, where, as here, the plaintiff only presents *merits* challenges to a trade
2 dress description, courts routinely deny motions to dismiss trade dress claims. *See*,
3 *e.g.*, *Lepton Labs*, 55 F. Supp. 3d at 1240-41 (denying motion to dismiss and holding
4 that defendant’s argument that it is not on sufficient notice of the trade dress because
5 the description is too vague “is an issue better tested at a later stage in the litigation”);
6 *IMEX*, 2023 WL 2626968, at *6 (denying motion to dismiss where plaintiff included
7 a trade dress description and holding that “these allegations [are] sufficient at this stage
8 of the proceedings”); *Deckers*, 2015 WL 12731929, at *4 (rejecting argument that
9 dismissal is warranted simply because an element of the trade dress description is “too
10 general”); *Health Indus. Bus. Commc’ns Council Inc. v. Animal Health Institute*, 481
11 F. Supp. 3d 941, 952 (D. Ariz. 2020) (sufficient notice where trade dress alleged was
12 “9-digit alphanumeric identifier for trading partners in the healthcare industry,
13 including the animal health industry”).

14 3. Plaintiffs Have Plausibly Pleaded Trade Dress Infringement Based
15 on the Identified Trade Dress

16 Even if the Court were to examine the merits of Zuru’s arguments against the
17 Identified Trade Dress, Plaintiffs’ trade dress description and pictures are sufficient to
18 put Zuru on notice under Rule 8. *See IMEX*, 2023 WL 2626968, at *7 (test on a motion
19 to dismiss is whether the complaint “plausibly alleges” trade dress infringement).

20 “The Ninth Circuit has emphasized that ‘[t]rade dress is the composite tapestry
21 of visual effects.’” *Lepton Labs*, 55 F. Supp. 3d at 1240 (quoting *Clicks Billiards*, 251
22 F.3d at 1259). That is why “[c]ourts have repeatedly cautioned that, in trademark-and
23 especially trade dress-cases,” the trade dress “must be examined as a whole, not by its
24

25 and/or found the trade dress description *sufficient*. *See, e.g., Sleep Science Partners v.*
26 *Lieberman*, 2010 WL 1881770, at *3-4 (N.D. Cal. May 10, 2010) (finding description
27 insufficient because, unlike here, “Plaintiff employs language suggesting that these
28 components are only some among many”); *Interactive Health LLC v. King Kong USA,*
Inc., 2008 WL 11337393, at *2-3 (C.D. Cal. Mar. 6, 2008) (holding at summary
judgment that the trade description was *not* “impermissibly vague”).

1 individual constituent parts.” *Clicks Billiards*, 251 F.3d at 1259 (citing 1 J. Thomas
2 McCarthy, McCarthy on Trademarks and Unfair Competition § 8:2 (4th ed. 2000)
3 (“[T]he issue is not whether defendant’s package or trade dress is identical to
4 plaintiff’s in each and every particular. Rather, it is the similarity of the total, overall
5 impression that is to be tested”)).

6 Here, as detailed in the Complaint, there are substantial allegations establishing
7 the plausibility that the overall, visual impression of the Identified Trade Dress is
8 distinct and infringed by Zuru’s products. The Squishmallows that practice the
9 Identified Trade Dress incorporate the enumerated elements which creates a distinct,
10 overall visual impression. (Compl. ¶ 24.) Indeed, as detailed by articles and consumer
11 comments, the consuming public recognizes the Identified Trade Dress as belonging
12 to Squishmallows. (*Id.* ¶¶ 32-33 (detailing success of the products); *id.* ¶¶ 34-38
13 (articles by leading publications like the *New York Times* and *Washington Post*,
14 celebrity fans, and awards).) In fact, the Identified Trade Dress is so distinctive that
15 consumers who saw the Zuru Infringing Products *believed that* the Zuru products were
16 actually Squishmallows. (*Id.* ¶¶ 54-57 (consumer “thought [Zuru’s Infringing
17 Products] were [Squishmallows] at a glance”).) This is not a surprise: the Zuru
18 Infringing Products clearly resemble the overall impression and visual effects of the
19 Identified Trade Dress. For example:

Plaintiffs' Original Product	Zuru's Infringing Product
	
	

(Compl. ¶ 43.)

Despite the widespread recognition and popularity of the Identified Trade Dress, Zuru asks this Court to hold that the Identified Trade Dress is insufficient for four reasons. All fail.

First, Zuru spends the bulk of its brief arguing, in isolation, that specific terms in specific elements are too vague. (*E.g.*, ECF 23 at 15-17 (arguing that individual words in individual elements are vague or could be functional).) This is contrary to Ninth Circuit law.

In the Ninth Circuit, the court must examine the trade dress “as a whole,” not the sufficiency of each “individual constituent part[]” on its own. *Clicks Billiards*, 251 F.3d at 1259. Indeed, “[t]he fact that individual elements of the trade dress may be[, for example,] functional does not necessarily mean that the trade dress *as a whole* is functional; rather, functional elements that are separately unprotectable can be protected together as part of a trade dress.” *Id.* (cleaned up) (emphasis in original).⁴

⁴ Contrary to this controlling Ninth Circuit law, Zuru argues that “Plaintiff[s] cannot enhance their definition of trade dress by adding plainly unprotectable features.” (ECF 23 at 17.) The Court should reject these misstatements of law.

1 Therefore, “it is crucial that [courts] focus *not* on the individual elements, but rather
2 on the overall visual impression that the combination and arrangement of those
3 elements create.” *Id.* (emphasis in original).⁵

4 Therefore, Zuru’s arguments about how an individual word or term in an
5 element is undefined, generic, non-distinctive,⁶ or functional are irrelevant and cannot
6 be a basis to dismiss Plaintiffs’ trade dress claims. (See ECF 23 at 15-17 (addressing
7 each element in isolation).) Indeed, courts routinely refuse to, *even at the summary*
8 *judgment stage*, engage in the element-by-element analysis that Zuru employs in its
9 Motion. See, e.g., *Herman Miller, Inc. v. Blumenthal Distributing, Inc.*, 2019 WL
10 1416472, at *9 (C.D. Cal. Mar. 4, 2019) (rejecting argument at summary judgment
11 that “certain elements” “are functional” because the court “must focus on the overall
12 effect of the combination of elements included in the asserted trade dress”); *Atari*

13 _____
14 ⁵ None of Zuru’s cited cases were on a motion to dismiss and, in any event, are
15 consistent with the Ninth Circuit’s controlling precedent in *Clicks Billiards*. (ECF 23
16 at 18 (citing *Leatherman Tool Grp., Inc. v. Cooper Indus., Inc.*, 199 F.3d 1009, 1013
17 (9th Cir. 1999) (holding, *after a jury verdict*, that even though “trade dress must be
18 viewed as a whole,” there was no protectable trade dress because, unlike here, the
19 elements were all functional, just an assemblage of tools like pliers, a serrated blade,
20 and a screwdriver); *Jeffrey Milstein, Inc. v. Greger, Lawlor, Roth, Inc.*, 58 F.3d 27, 32
21 (2d Cir. 1995) (holding on a *preliminary injunction motion* that “it is the combination
22 of elements that should be the focus of the distinctiveness inquiry”); *Landscape Forms,*
23 *Inc. v. Columbia Cascade Co.*, 113 F.3d 373, 381-82 (2d Cir. 1997) (remarking on a
24 *preliminary injunction motion* that “we still recognize that there is no question that
25 trade dress may protect the ‘overall look’ of a product”).)

26 ⁶ For example, Zuru asserts that because there may be other products that meet *some*
27 of the elements of the Identified Trade Dress, Plaintiffs cannot maintain their claim
28 here. (ECF 23 at 19.) This argument improperly relies on documents outside of the
pleadings that the Court cannot take judicial notice of and demands that the Court
resolve a factual dispute rather than assume the truth of Plaintiffs’ substantial
allegations showing that the Identified Trade Dress has become distinctive and
popular. (Compl. ¶¶ 28-39.) In any event, this is a fact dispute for discovery and trial.
Cf. Nat’l Prods., Inc. v. Arkon Resources, Inc., 2017 WL 5499801, at *7-8 (W.D.
Wash. Nov. 16, 2017) (holding that third party products may be introduced at trial “in
an attempt to argue that [plaintiff]’s trade dress is not distinctive”).

1 *Interactive, Inc. v. Hyperkin Inc.*, 2020 WL 4287584, at *10 (C.D. Cal. July 27, 2020)
2 (rejecting summary judgment argument based on the alleged functionality of
3 individual elements and holding that “overall [] impression” is a fact issue “even
4 assuming that *individual* elements” are functional (emphasis in original)).

5 This Court should likewise, as required by Ninth Circuit authority, examine the
6 “overall visual impression” of the Identified Trade Dress, not the individual
7 components on which Zuru focuses. *Clicks Billiards*, 251 F.3d at 1259.

8 *Second*, Zuru claims that the elements of the Identified Trade Dress “just
9 broadly describe attributes of innumerable stuffed toy products.” (ECF 23 at 18.) Not
10 so.

11 The Identified Trade Dress identifies a list of the *specific* attributes of Plaintiffs’
12 products that are *intentional design choices* to differentiate the Identified Trade Dress
13 from other products available on the market. For example, the pictures in the
14 Complaint show that the Identified Trade Dress *chose* to incorporate “Asian style
15 Kawaii faces,” which are a simplified, visual rendition of a face evoking a likeness
16 with Japanese emoticons. (Compl. ¶ 24.) This is distinct from typical stuffed animals
17 that attempt to faithfully recreate an animal’s likeness, with eyes that match how they
18 may appear in the wild. Likewise, the Identified Trade Dress *chose* to incorporate
19 egg/bell shapes, rather than the shape of the animal in the wild as other toys do. (*Id.*)
20 These *design choices*, combined with the other design choices detailed in the Identified
21 Trade Dress, create the overall visual impression that consumers associate with
22 Plaintiffs’ products. (*Id.* ¶¶ 28-39.) See *Vans, Inc. v. ACI Int’l*, 2023 WL 6930323, at
23 *8 (C.D. Cal. Oct. 11, 2023) (finding particularity requirement satisfied where trade
24 dress was defined as “visible stitching, including where the eyestay meets the vamp”
25 and “visible stitching, including separating the individual ankle collar corrugations”).

26 At the motion to dismiss stage, the Court must assume these allegations to be
27 true and thereby deny Zuru’s motion to dismiss. See, e.g., *Lepton Labs*, 55 F. Supp.
28 3d at 1237 (“A court is generally limited to the pleadings and must construe all factual

1 allegations set forth in the complaint as true and in the light most favorable to the
2 plaintiff.” (cleaned up)).

3 *Third*, Zuru claims that *every* product branded “Squishmallows” must practice
4 the Identified Trade Dress for the trade dress to be protectable. (ECF 23 at 18-19.)
5 This is not the law.

6 As numerous district courts in the Ninth Circuit have recognized, “the Ninth
7 Circuit has not yet adopted the ‘consistent overall look’ test for trade dress claims
8 based upon a line of products.” *Moroccanoil, Inc. v. Marc Anthony Cosmetics, Inc.*,
9 57 F. Supp. 3d 1203, 1223-24 (C.D. Cal. 2014); *Paramount*, 2012 WL 5974169, at *2-
10 3 (similar). But even courts applying that test recognize that “[t]his standard do[es]
11 not require that the appearance of the series or line of products or packaging be
12 identical.” *Moroccanoil*, 57 F. Supp. 3d at 1223-24 (internal quotation omitted).
13 Instead, “a plaintiff generally is permitted to define a product line as it sees fit.” *Id.*
14 “The issue is [simply] whether the trade dress conveys a single and continuing
15 commercial expression.” *Id.* at 1224.

16 Here, Zuru’s argument confuses the Identified Trade Dress with the
17 Squishmallows *trademark*. The fact that Plaintiffs’ Squishmallows *trademark* applies
18 to a variety of products is irrelevant as to whether the *Identified Trade Dress* is
19 protectable. Plaintiffs no more lose the right to the Identified Trade Dress by releasing
20 other designs for Squishmallows than Coca-Cola would lose the right to the iconic
21 Coca-Cola bottle trade dress by releasing alternative product designs. Indeed, courts
22 allow plaintiffs to “only seek[] trade protection over the [products] that bear the []
23 indicia of the” claimed trade dress because “even if plaintiff distributed the same
24 products in fifteen different package designs for each of fifteen different customers,
25 this fact alone would not prevent plaintiff from obtaining trade dress protection for one
26 of the fifteen different packaging styles.” *Paramount*, 2012 WL 5974169, at *3
27 (cleaned up). That is precisely the case here: Plaintiffs seek protection only for the
28

1 Identified Trade Dress, *not* designs for every Squishmallows-branded product ever
2 sold.

3 Regardless, Zuru’s argument is premature. Courts routinely hold, even on
4 *summary judgment*, that whether a line of products have a “consistent overall look” is
5 a triable jury issue. *See, e.g., Moroccanoil*, 57 F. Supp. 3d at 1224 (“Viewing the []
6 line of products in the light most favorable to Plaintiff, there is a triable issue of fact
7 as to whether [the] products present a ‘consistent overall look.’”).

8 *Fourth*, Zuru argues, with no legal support, that “Plaintiffs do not appear to have
9 obtained any federal registration” for the Identified Trade Dress, which “can serve as
10 a litmus test for the sufficiency of the trade dress definition.” (ECF 23 at 19-20 (citing
11 only 37 C.F.R. § 2.52 (which *allows*, rather than mandates, registration of trade dress).)
12 This is, again, not the law. Section 43 of the Lanham Act—the provision at issue
13 here—“protects against infringement of *unregistered* marks and *trade dress* as well as
14 registered marks.” *GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1205 n.3 (9th
15 Cir. 2000) (emphasis added) (noting that “the same standard applies to both registered
16 and unregistered trademarks” (cleaned up)); McCarthy on Trademarks and Unfair
17 Competition § 8:1 (5th ed.) (“These days, unregistered trade dress is protected under
18 federal Lanham Act § 43(a)(1)(A) under essentially the same rules as are
19 trademarks.”).

20 4. Both Courts to Consider the Identified Trade Dress Have Held It
21 to Be Sufficiently Plead

22 Even if Plaintiffs were required to identify all elements of its trade dress at the
23 pleading stage, this Court should follow *both of the other district courts* to consider
24 the Identified Trade Dress and hold that it is sufficient to proceed to discovery.

25 Plaintiffs pleaded a five-element trade dress definition in their Complaint.
26 (Compl. ¶ 24.) As detailed below, the same Identified Trade Dress has been presented
27 to two other district courts by a different company that previously owned
28

1 Squishmallows.⁷ Both courts to consider the Identified Trade Dress have found it to
2 be sufficient.

3 In *Kellytoy Worldwide, Inc. v. Hugfun Int’l, Inc.*, Judge Fitzgerald addressed the
4 sufficiency of the same trade dress pleaded in the Complaint in this case. (*Compare*
5 2019 WL 8064073, at *2 (quoting asserted trade dress description), *with* Compl. ¶ 25
6 (asserting same trade dress description).) He held that the Identified Trade Dress
7 “satisfies the requirements of Rule 8” because it “describes the [t]rade [d]ress in detail
8 and attaches photos of its line of plush toys.” *Hugfun*, 2019 WL 8064073, at *4. He
9 rejected defendant’s arguments, the same as Zuru’s here, that individual elements of
10 the Identified Trade Dress are “vague and overbroad” because the focus must be on
11 the “composite tapestry of visual effects,” not a “feature on its own.” *Id.* (cleaned up).
12 Accordingly, Judge Fitzgerald held that “the overall description of the [Identified]
13 Trade Dress gives [d]efendants sufficient notice to survive dismissal.” *Id.*⁸

14 The decision in *Kellytoy Worldwide, Inc. v. Ty, Inc.* is in accord.⁹ There, the
15 plaintiff asserted the same trade dress at issue here. 2020 WL 5026255, at *2 (detailing
16

17 ⁷ As explained in the Complaint, non-party Kellytoy Worldwide, Inc. previously
18 owned the copyrights and trade dress rights at issue. (Compl. ¶ 13.) On March 31,
19 2020, those rights were fully assigned and transferred to Plaintiff Kelly Toys Holdings,
20 LLC. (*Id.*)

21 ⁸ Though Judge Fitzgerald in *Hugfun* did dismiss the trade dress claims with a right to
22 amend for failure to plead non-functionality, the complaint there only included a
23 “conclusory statement that ‘the Squishmallow Trade Dress is non-functional,’” 2019
24 WL 8064073, at *5, as opposed to the detailed non-functionality allegations in
25 paragraph 25 of the Complaint in this case. And in addition to providing leave to
26 amend, the court in *Hugfun* “s[aw] no reason to deviate from the well-established
27 approach that functionality should not be resolved at this stage” and thus refused to
28 “entertain the merits of functionality at this stage.” 2019 WL 8064073, at *5.

⁹ In denying the defendant’s motion to dismiss, the court relied on its findings in its
prior ruling on the plaintiff’s preliminary injunction motion. 2020 WL 5026255, at *1
 (“Having recognized that Kellytoy had some likelihood of success on its
Squishmallows-related claims, it would be odd for the court now to close its eyes to
(Continued...)

the asserted trade dress). Like Zuru here, the defendant there argued that “the Squishmallows’ trade dress is not articulated with sufficient particularity, both because the operative complaint’s description of the trade dress is too vague and because the claimed trade dress is not used consistently.” 2020 WL 5891386, at *2. The court rejected these arguments, holding that “when read in the light of the images of the Squishmallows toys at issue, the court could not say that [the] description fails to put [defendant] on notice of the contours of its claimed trade dress.” *Id.* (cleaned up). And the court additionally found, contrary to Zuru’s argument here, that “a plaintiff is entitled to claim trade dress protection for a subset of its products.” 2020 WL 5026255, at *3.

Zuru asks this Court to ignore these prior rulings on the *same* Identified Trade Dress and instead follow the order in *Kellytoy USA, Inc. v. Dan-Dee Int’l, Ltd.*, which addressed a *different* trade dress description. (ECF 23 at 20 (submitting the order in Case No. 2:18-cv-05399-JAK (C.D. Cal. Feb. 7, 2019) as ECF 23-2).) Not so.

In *Dan-Dee*, the court addressed a trade dress description that was far less detailed with fewer elements than in this case. (ECF 23-2 at 2.) Indeed, a side-by-side comparison plainly shows the significant differences between the description in *Dan-Dee* and the description in this case:

<i>Dan-Dee</i> Case (ECF 23-2 at 2)	This Case (Compl. ¶ 25)
(1) substantially bell-shaped plush toys embodying fanciful renditions of animals/characters, (2) embroidered anime-inspired minimalist, whimsical facial features, (3) a velvety velour-like textured exterior, and (4) stuffing with a light “marshmallow,” memory foam-like texture.	(1) substantially egg/bell shaped plush toys depicting various similarly shaped fanciful renditions of animals/characters; (2) simplified Asian style Kawaii faces with repeating and complementary rounded/oval shaped graphics depicting features on the characters themselves (such as eyes, snouts and bellies) and which conform to and support the overall

the evidence it considered in reaching that conclusion and to hold, without considering that evidence, that those claims fail as a matter of law.” (citing *Ty, Inc.*, 2020 WL 5891386, at *2 (N.D. Ill. Aug. 25, 2020)).

	egg/bell shape of the toys; (3) embroidered facial features, such as eyes, nostrils, and/or mouths; (4) distinctive contrasting and non-monochrome coloring; and (5) short-pile velvety velour-like textured exterior with a light and silky memory foam-like stuffing providing an extremely soft and squeezable marshmallow feel
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It was the above description on the left with *far less detail* that the *Dan-Dee* court held provided “little insight into the scope or nature of [plaintiff’s] claim” because the description “can reasonably be construed as substantially broader than the trade dress protection [plaintiff] actually seeks.” (ECF 23-2 at 9.) Then, after the court provided leave to amend, the plaintiff filed an amended complaint with the same Identified Trade Dress as in this case. (Mishra Decl. Ex. A ¶ 23.) Significantly, the *Dan-Dee* court *never* evaluated or issued any decision about the sufficiency of the Identified Trade Dress. (Mishra Decl. ¶ 3.)

Finally, Zuru argues, without any legal support, that because the plaintiff in *Dan-Dee* (as well as in *Hugfun* and *Ty, Inc.*) settled before final judgment, the court’s decision on the less-detailed trade dress description “have now become res judicata.” (ECF 23 at 22 (citing zero cases).) This argument defies logic and is contrary to black letter law. None of those cases gives rise to res judicata in this case because there was no final judgment on the merits of *the trade dress claims* in any of the cases, just a settlement between those specific parties, none of which are before this Court today. *See Pac. Gas and Elec. Co. v. Lynch*, 216 F. Supp. 2d 1016, 1026 (N.D. Cal. 2002) (“evidence of a settlement is generally not relevant, because settlements may be motivated by a variety of factors unrelated to liability” (citing *Hudspeth v. CIR*, 914 F.2d 1207, 1213-14 (9th Cir. 1990)). And, in any event, the *Dan-Dee* order cannot have any res judicata effect because the dismissal was with *leave to amend*, it was not a final judgment. *See WMX Techs., Inc. v. Miller*, 104 F.3d 1133, 1136-37 (9th Cir.

1 1997) (“[W]hen a district court expressly grants leave to amend, it *is* plain that the
2 order is not final.” (emphasis in original)).

3 In sum, Zuru has not cited *any case* holding that the Identified Trade Dress is
4 insufficient to provide notice at the pleading stage. Instead, both of the cases that
5 evaluated the Identified Trade Dress found it to be sufficient and allowed the plaintiff’s
6 trade dress claims to proceed to discovery. This Court should do the same.

7 **B. There is No Legal Requirement to Submit Deposit Images in a**
8 **Complaint**

9 Zuru requests that Plaintiffs provide the original images submitted with the
10 deposit copies of the Copyrighted Works to the United States Copyright Office. Zuru
11 cites only one case, the out-of-circuit *Parker v. Hinton*, 2023 WL 370910, at *4 (6th
12 Cir. Jan. 24, 2023), for this request. *Parker* is inapplicable to the facts of this case. In
13 *Parker*, the plaintiffs “did not file a deposit copy” at all with the Copyright Office, and
14 “conceded that no such deposit copies existed.” *Id.* at *3 (internal punctuation
15 omitted). In contrast, here, deposit copies of the Copyrighted Works were filed with
16 the Copyright Office and will be available through discovery. (Mishra Decl. ¶ 4.)

17 Moreover, *Parker* was decided on a motion for summary judgment, and found
18 that because the plaintiffs “never produced a deposit copy of their sheet music,” they
19 “failed to meet their burden on summary judgment.” *Id.* at *4.¹⁰ However, “[a] motion
20 to dismiss under Rule 12(b)(6) challenges the legal sufficiency of the claims stated in
21 the complaint,” not materials outside the complaint such as deposit copy images. *R &*
22 *A Synergy LLC*, 2019 WL 8137706, at *1. *Parker* does not discuss the production of
23 deposit copies on a motion to dismiss, and Defendant’s attempt to require Plaintiffs to
24 provide these images at the pleadings stage is premature.

25
26
27 ¹⁰ Defendant also cites *Williams v. Bridgeport Music, Inc.*, 2014 WL 7877773, at *9
28 (C.D. Cal. Oct. 30, 2014), which was also decided on a motion for summary judgment.
For the same reasons as *Parker*, *Williams* is inapposite.

1 **C. Plaintiffs Do Not Oppose Zuru's Standing and Preemption**
2 **Arguments**

3 The parties have met and conferred regarding the issues Zuru identifies as “Lack
4 of Standing” and “Copyright Preemption.” (ECF 23 at 24–25.) Plaintiffs do not
5 oppose Zuru's argument on these two points and, in fact, offered to stipulate to them
6 before Zuru filed its motion to dismiss. Plaintiffs clarify that the only plaintiff
7 asserting a claim for federal copyright infringement is Kelly Toys Holdings, LLC.
8 Plaintiffs also agree that none of their state law claims will be premised on copyright
9 infringement.

10 **D. If Needed, Plaintiffs Should Be Provided Leave to Amend**

11 If the Court finds that Plaintiffs have not adequately articulated a protectable
12 trade dress or should have included deposit copies in their Complaint, Plaintiffs request
13 leave to amend the Complaint.

14 Leave to amend should be freely given “when justice so requires,” Fed. R. Civ.
15 P. 15(a)(2), and courts frequently “allow leave to amend to re-state the trade dress
16 allegations in detail.” *Creative Co-Op, Inc. v. Elizabeth Lucas Co.*, 2012 WL 761736,
17 at *3 (D. Idaho Mar. 7, 2012) (collecting cases). Accordingly, to the extent that the
18 Court finds Plaintiffs have not alleged a protectable trade dress, Plaintiffs request leave
19 to amend to restate the trade dress allegations in greater detail to address those
20 deficiencies, and likewise include deposit copies of the Copyrighted Works. Indeed,
21 even the cases cited by Zuru that dismissed trade dress claims allowed leave to amend.
22 *See, e.g., Crafty*, 389 F. Supp. 3d at 881-83 (“And although Defendants ask the Court
23 not to do so, the Court will grant Plaintiffs leave to amend, to the extent Plaintiffs can
24 more clearly describe the trade dress they seek to protect.”).

25 **IV. CONCLUSION**

26 Zuru's Motion relies on inapplicable law and disputed facts, many outside of
27 the record, in an attempt to escape liability for its decision to prey on unwitting
28 consumers by trading on Plaintiffs' distinctive trade dress. Zuru's arguments are

1 inconsistent with controlling law and effectively demand that the Court hold that
2 Plaintiffs' detailed trade dress description to be insufficient simply because Zuru
3 disagrees that it is protectable. In reality, Plaintiffs have done more than enough to
4 identify their trade dress at this stage and Zuru's arguments to the contrary must be
5 resolved at summary judgment or trial, not the pleading stage. Zuru's motion to
6 dismiss should be denied.

7
8 Dated: January 22, 2024

Respectfully submitted,

9
10 **HUESTON HENNIGAN LLP**

11
12
13 By: /s/ Moez M. Kaba
Moez M. Kaba

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15 *Kelly Toys Holdings, LLC;*
16 *Jazwares, LLC; Kelly Amusement*
17 *Holdings, LLC; and Jazplus, LLC*
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CERTIFICATE OF COMPLIANCE

The undersigned counsel of record for Plaintiffs certifies that this brief contains 6,920 words, which complies with the word limit of L.R. 11-6.1.

Dated: January 22, 2024

/s/ Moez M. Kaba
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EXHIBIT A

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*Attorneys for Plaintiffs Kellytoy (USA),
Inc. and Kellytoy Worldwide, Inc.*

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA – WESTERN DIVISION

KELLYTOY (USA), INC., a California
corporation; and KELLYTOY
WORLDWIDE, INC., a California
corporation;

Plaintiffs,

vs.

DAN-DEE INTERNATIONAL, LTD.,
a Delaware corporation; RITE AID
CORPORATION, a Delaware
corporation, and DOES 1 through 10,
inclusive,

Defendants.

Case No. 2:18-cv-05399 JAK (AGRx)

**SECOND AMENDED COMPLAINT
FOR:**

- 1. FEDERAL COPYRIGHT INFRINGEMENT (17 U.S.C. § 501);**
- 2. FEDERAL TRADEMARK INFRINGEMENT, FALSE DESIGNATION OF ORIGIN AND FALSE DESCRIPTION (15 U.S.C. § 1125);**
- 3. COMMON LAW TRADEMARK INFRINGEMENT;**
- 4. CALIFORNIA COMMON LAW UNFAIR COMPETITION; AND**
- 5. CALIFORNIA STATUTORY UNFAIR COMPETITION.**

DEMAND FOR JURY TRIAL

Plaintiffs KELLYTOY (USA), INC., a California corporation and
KELLYTOY WORLDWIDE, INC., a California corporation (collectively,
“Kellytoy”) bring this action against defendant DAN-DEE INTERNATIONAL,
LTD., a Delaware corporation (“Dan-Dee”), RITE AID CORPORATION, a
Delaware corporation (“Rite Aid”), and DOES 1 through 10 (collectively,

1 “Defendants”) for injunctive relief and damages under the laws of the United States
2 and the State of California as follows:

3 **JURISDICTION AND VENUE**

4 1. This action arises under the copyright laws of the United States, 17
5 U.S.C. § 101 *et seq.*, the trademark laws of the United States, 15 U.S.C. § 1125(a),
6 and under the statutory and common law of trademark/trademark infringement and
7 unfair competition.

8 2. This Court has jurisdiction under 28 U.S.C. §§ 1331, 1338, and 1367,
9 and 15 U.S.C. §§ 1116, 1117, 1121, and 1125.

10 3. Venue lies in this judicial district pursuant to 28 U.S.C. § 1391 and
11 1400(a).

12 4. This Court has personal jurisdiction over Defendants, as Defendants are
13 doing business in California and this District and are subject to the jurisdiction of
14 this Court. Indeed, defendant Dan-Dee actively distributes plush toys throughout
15 the state of California and this District. Similarly, defendant Rite Aid has numerous
16 retail stores within the state of California and this District. In addition, defendants
17 Dan-Dee and Rite Aid knowingly infringed on Kellytoy’s copyrights and trade
18 dress, knowing that Kellytoy is a California resident, and thereby purposefully
19 directed their activities towards California.

20 **NATURE OF THE ACTION**

21 5. This is an action for copyright infringement under the Copyright Act,
22 17 U.S.C. §§ 101, *et seq.*; and trade dress infringement, trademark infringement,
23 unfair competition and false designation of origin under the Lanham Act, 15 U.S.C.
24 § 1125(a), California Bus. & Prof. Code § 17200, *et seq.*, and the common law.

25 6. Kellytoy’s SQUISHMALLOW branded plush toys (“Squishmallows”)
26 – representative samples of which are depicted in **Exhibit 1** hereto – are one of the
27 world’s hottest plush toy lines. Kellytoy’s Squishmallows feature a highly
28 distinctive and widely recognized trade dress, which Kellytoy pioneered and

1 created. Kellytoy actively markets its Squishmallows through numerous media
2 outlets, including, without limitation, on social media, at tradeshow, through
3 Squishmallows.com, amazon.com, walmart.com, walgreens.com and target.com,
4 and on Kellytoy's website, depicting images of its proprietary Squishmallows line of
5 plush toys.

6 7. The explosion in popularity of Kellytoy's Squishmallows and the
7 resulting and widespread customer and industry recognition, has unfortunately led to
8 illegal imitation by Kellytoy's competitors. Indeed, Kellytoy has discovered that
9 defendant Dan-Dee has been manufacturing and offering for sale to Rite Aid, which
10 Rite Aid has re-sold, numerous units of two knock-off products for distribution
11 within this state and district that both infringe upon Kellytoy's trade dress and one
12 of which infringes upon Kellytoy's copyrighted design in its Squishmallows.

13 8. Accordingly, to prevent and remediate the rampant consumer confusion
14 and misappropriation of Kellytoy's copyrighted designs in its Squishmallows
15 resulting from Defendants' unauthorized use, promotion and sale of the Infringing
16 Plush (defined below), and to compensate Kellytoy for its injuries, Kellytoy seeks
17 immediate and permanent injunctive relief, compensatory damages, disgorgement of
18 Defendants' profits, statutory damages, punitive damages, Kellytoy's reasonable
19 attorneys' fees and expenses, a product recall, and corrective advertising sufficient
20 to address Defendants' wrongdoing.

21 **THE PARTIES**

22 9. Kellytoy (USA), Inc. is a California corporation with its principal place
23 of business located in Los Angeles, California.

24
25 10. Kellytoy Worldwide, Inc. is a California corporation with its principal
26 place of business located in Los Angeles, California.

27 11. Kellytoy is in the business of developing, manufacturing and selling
28 children's toys including, among other things, plush toys.

Kellytoy and Its Protected Intellectual Property Rights

EXHIBIT K
Page 115 of 135

1 innovative plush toys that are highly prized in the industry.

2 20. Kellytoy devotes extensive time and resources promoting and
3 preserving its image identity and the image and identity of its high quality plush
4 toys, including by creating distinctive designs and marks for use on its products and
5 seeking U.S. trademark and copyright registrations for such designs and marks,
6 including those at issue in this Complaint.

7 21. In 2016, Kellytoy conceived of and began creating its Squishmallows
8 line of plush toy designs – ultimately marketed in connection with the
9 SQUISHMALLOW trademark – that share common, unique features that
10 distinguish them from the goods of others. These designs are wholly original to
11 Kellytoy and comprise copyrightable subject matter under the laws of the United
12 States.

13 22. Indeed, Kellytoy has been and is the sole owner of all right, title and
14 interest in and to the copyrights in the individual “characters” in the Squishmallows
15 line and the distinguishing, unique, and recognizable features that are common
16 across the Squishmallows line. From 2016 to the present, Kellytoy has expended
17 large sums of money in developing, advertising and promoting these product
18 designs through the United States. In fact, Kellytoy is spending approximately
19 \$50,000 per month in direct to consumer and business-to-business advertising in
20 connection with its SQUISHMALLOW branded goods.

21 23. Kellytoy sells a broad range of SQUISHMALLOW branded plush toys
22 featuring the brand’s iconic trade dress, and whose overall look, feel and image –
23 and in particular but without limitation its shapes, colors, textures and graphics –
24 serve as a distinctive source identifier to the consuming public. Though not easily
25 reduced to writing, these features include: (1) substantially egg/bell shaped plush
26 toys depicting various similarly shaped fanciful renditions of animals/characters; (2)
27 simplified Asian style Kawaii faces with repeating and complementary rounded/oval
28 shaped graphics depicting features on the characters themselves (such as eyes,

1 snouts and bellies) and which conform to and support the overall egg/bell shape of
2 the toys; (3) embroidered two-dimensional facial features, such as eyes, nostrils,
3 mouths; (4) distinctive contrasting and non-monochrome coloring; and (5) short-pile
4 velvety velour-like textured exterior with a light and silky memory foam-like
5 stuffing providing an extremely soft and squeezable marshmallow feel. These
6 features, and the resulting overall look and feel of these toys, are more fully
7 depicted, without limitation, in **Exhibit 1** hereto – features common to Kellytoy’s
8 line of Squishmallows (collectively together with **Exhibit 1** the “Squishmallow
9 Trade Dress”).

10 24. The plush designs depicted in **Exhibit 2** – a subset of Kellytoy’s line of
11 Squishmallows – comprise some of Kellytoy’s most popular Squishmallows, which
12 were created by or assigned to Kellytoy (the “Squishmallow Designs”). As
13 explained in greater detail below, these Squishmallow Designs are the subject of
14 Copyright Registrations issued by the United States Copyright Office, pursuant to
15 17 U.S.C. §101 *et seq.*

16 25. Continuously and without interruption, beginning in 2016, Kellytoy has
17 expended a great deal of time, effort, and money in the promotion of its
18 Squishmallows. And due to Kellytoy’s unique design, robust marketing efforts,
19 media coverage, and market penetration, the Squishmallow Trade Dress has
20 acquired distinctiveness in the marketplace when applied to plush toys. Indeed,
21 because of Kellytoy’s extensive promotional activities and widespread display of its
22 Squishmallows directed to the public, and as a consequence of Kellytoy’s fair and
23 honorable dealings with its customers, the relevant consuming public has come to
24 recognize and associate plush toys bearing the Squishmallow Trade Dress as high
25 quality goods connected with or offered by a single source, Kellytoy. The
26 Squishmallow Trade Dress has valuable goodwill and consumer recognition
27 associated with it and has come to symbolize the valuable goodwill and reputation
28 of Kellytoy.

1 26. In addition to being original and inherently distinctive, the
2 Squishmallow Trade Dress is widely recognized by consumers. A simple Internet
3 search using the Google search engine yields about 1,140,000 "hits" for the search
4 term "Squishmallows."

5 27. In addition to marketing and selling them through thousands of retail
6 stores nationwide, Kellytoy markets and sells its Squishmallows on its website
7 <squishmallows.com> featuring dozens of copyright-protected photographs of its
8 plush toys and models holding its Squishmallows. Copies of the homepage and
9 other representative pages from <squishmallows.com> are attached as **Exhibit 3**.

10 28. Further adding to their recognizability and secondary meaning in the
11 marketplace, Squishmallows have been featured in numerous magazines, press
12 articles, reviews, and videos, as set forth in greater detail in **Exhibit 4** hereto,
13 including many mainstream media outlets such as the *Washington Post*, the *Chicago*
14 *Tribune*, the *Daily Harold*, *Okay! Magazine*, among others. By way of example
15 only, Squishmallows have been also recognized by The *Washington Post* and
16 *Consumer Reports* on their 2017 Holiday Gift Guides; *LA Parent* recognized
17 Squishmallows in its October 2017 issue, under the "Products We Love" section;
18 and, as depicted below, *OK! Magazine* featured Squishmallows in its August 21,
19 2017 issue, stating "Cuddly as they are cute, they make great couch pals, pillows
20 and bedtime buddies in any home. Collect the whole squad! squishmallows.com."



29. Kellytoy's Squishmallows have also been featured in the October 2017 issues of *L.A. Parent Magazine*, *City Parent Magazine*, and *San Diego Family Magazine* and included in the 2017 gift guides for various publications, including in *The Washington Post*, *The Houston Chronicle*, and *L.A. Parent*.

30. Kellytoy's Squishmallows have also been the subject of numerous industry awards and product recommendation lists, including by the National Parenting Product Awards, Parents' Choice, and TTPM, as more fully set out in **Exhibit 4**. In fact, Kellytoy's Squishmallows were named by *Toy Insider* as one of the "Top Holiday Toys," made the cover the September/October 2017 *Toy Book Magazine*, and have been featured in numerous other trade magazines, such as, *Teddy Bear and Friends Magazine* and *Animal Tales Magazine*.

31. Kellytoy's Squishmallows have also, as alleged above, been the subject of consistent and elaborate marketing campaigns, including email campaigns, social media posts, and direct to consumer advertising. Kellytoy's Squishmallows currently have nearly 44,300 Instagram followers, more than 60,000 Facebook

1 followers – more than many longer-existing and well-known plush brands. To its
2 followers, Kellytoy regularly publishes photographs of its Squishmallows. Many of
3 these followers, in turn, share these posts with their friends and social media
4 followers. A copy of Squishmallows Instagram page is attached as **Exhibit 5**.

5 32. In addition, hundreds of well-known YouTube influencers and vloggers
6 have shared and posted images and videos of themselves holding plush toys in
7 Kellytoy’s line of Squishmallows products. Tens of thousands of consumers have
8 done the same through numerous media platforms, including, Facebook, Instagram,
9 Pinterest and YouTube. These posts have generated millions of “likes” and
10 “shares.”

11 33. Squishmallows’ legion of loyal fans have been extremely engaged on
12 social media, including Facebook and Instagram, demonstrating their awareness and
13 affection for Kellytoy’s Squishmallows, with the average Squishmallows post likes
14 on Instagram hovering over 1000+ per post and 45-100 average comments per post.

15 34. Kellytoy’s Squishmallow website traffic has grown exponentially since
16 its launch in 2017 to an average of 4,313 visits per day.

17 35. Kellytoy’s Squishmallows are listed amongst the leading global brands
18 and toys such as Hatchimals, Hasbro, RB, Hot Wheels, NERF, and Spin Master by
19 several industry publications.

20 36. As a direct result of Kellytoy’s efforts at promoting and building its
21 brand, Kellytoy’s Squishmallows line has exploded in popularity, creating
22 substantial demand for and interest in Squishmallows, and generating enormous
23 goodwill in the Squishmallows brand and the Squishmallows Trade Dress in the
24 United States and around the world. In fact, Kellytoy’s Squishmallows are sold
25 through hundreds of retailers including some of the largest retailers in the country,
26 including, approximately 1000 Costco stores, 5,500 Walmart stores, 8,500
27 Walgreens stores, 4,000 Kroger supermarkets and Fred Meyer stores, 2000 Target
28

1 stores, 900 Party City stores, amongst other outfits such as Dave & Busters, Knotts
2 Berry Farms and numerous others.

3 37. Since the summer of 2017, Kellytoy has sold approximately a
4 whopping 22 million (22,000,000) units of Squishmallows with no indication that
5 sales will be slowing down anytime soon. Kellytoy's Squishmallows products
6 embodying the Squishmallows Trade Dress have yielded tens of millions of dollars
7 of sales in the U.S. over the past year.

8 38. In fact, Kellytoy's Squishmallows sold out through Walgreens.com
9 during their Gift of the Week promotion in early November 2017, as well as
10 exceeding all sales goals for the campaign, both online and in stores.

11 39. Because of Squishmallows' massive success and popularity, consumers
12 have come to associate Kellytoy's high-quality Squishmallows plush toys with the
13 Squishmallows Trade Dress and, conversely, have come to recognize the
14 Squishmallow Trade Dress as a designation of source.

15 **Defendants' Unlawful Conduct**

16 40. At the outset, none of the defendants to this action is licensed or
17 otherwise authorized by Kellytoy to market or distribute products bearing or
18 embodying Kellytoy's Squishmallow Designs and/or Squishmallow Trade Dress.

19 41. Upon information and belief, sometime in spring of 2018, notably well
20 after Kellytoy established its reputation in its Squishmallow Trade Dress, Defendant
21 Dan-Dee entered into an agreement with defendant Rite Aid to have Dan-Dee sell
22 and supply to Rite Aid various plush toys bearing substantially similar copies of
23 Kellytoy's Squishmallow Designs and Squishmallow Trade Dress (hereinafter
24 referred to as "Infringing Plush") for distribution by Rite Aid through its United
25 States stores. Photographs of the Infringing Plush bearing Dan-Dee and Rite Aid's
26 trademarks are collectively attached hereto as **Exhibit 6**.

27 42. Upon information and belief, Dan-Dee offered to sell the Infringing
28 Plush to Rite Aid in the United States, corresponded across state lines with Rite Aid

1 in the United States concerning the production, sale, and distribution of the
2 Infringing Plush, and transported the Infringing Plush to Rite Aid in interstate
3 commerce.

4 43. Upon information and belief, Defendants manufactured in, and
5 imported from, China a production run of the Infringing Plush into the United States
6 for the purpose of having the Infringing Plush enter interstate commerce and/or to
7 be transported or used in interstate commerce through the same channels of trade
8 through which Kellytoy sells its Squishmallows plush. Upon information and
9 belief, Rite Aid has indeed sold the Infringing Plush in interstate commerce.

10 44. Upon information and belief, Dan-Dee has agreed to sell the Infringing
11 Plush to Rite Aid at prices that were/are relatively lower than the prices charged by
12 Kellytoy for its Squishmallows plush. Kellytoy is informed and believes that Dan-
13 Dee is able to undercut Kellytoy's sales prices because, rather than investing in
14 creating its own designs and identity, Dan Dee has copied Kellytoy's proprietary
15 Squishmallow Designs and Squishmallow Trade Dress and because Defendants'
16 Infringing Plush are of inferior quality as compared to Kellytoy's
17 SQUISHMALLOW branded plush.

18 45. In fact, Kellytoy met with buyers from Rite Aid in 2017 during which
19 Kellytoy showed the buyers Kellytoy's Squishmallows line of products together
20 with pricing therefor, after which, Kellytoy suspects that Rite Aid submitted
21 Kellytoy's bid, together with facsimiles of the designs, to defendant Dan-Dee to
22 obtain a competing bid from Dan-Dee for copies thereof.

23 46. Kellytoy is informed and believes that Defendants, without Kellytoy's
24 consent or permission, intend to sell, advertise, promote, display, and distribute, toys
25 bearing Squishmallow Designs and Squishmallow Trade Dress in United States
26 commerce.

27 47. The activities of Defendants in copying, distributing, advertising,
28 selling, offering for sale and otherwise using the Squishmallow Trade Dress

1 embodied in the Infringing Plush – including by copying wholesale the shape and
2 look – constitute false designation of origin regarding sponsorship of those plush
3 toys and falsely represent to the public that Defendants' plush toys originate from
4 Kellytoy, and/or that Defendants' plush toys have been sponsored, approved or
5 licensed by Kellytoy, or in some way affiliated or connected with Kellytoy. Such
6 activities of Defendants are likely to confuse, mislead, and deceive Defendants'
7 customers, purchasers, and members of the public as to the origin of the toys bearing
8 the Squishmallow Trade Dress, or to cause such persons to believe that Defendants'
9 Infringing Plush and/or Defendants have been sponsored, approved, authorized, or
10 licensed by Kellytoy or in some way affiliated or connected with Kellytoy, all in
11 violation of 15 U.S.C. §1125(a).

12 48. Upon information and belief, the activities of Defendants were done
13 willfully with full knowledge of the falsity of such designations of origin and false
14 descriptions or representations, with the intent to trade on the enormous goodwill
15 Kellytoy has earned in its Squishmallows, and with the intent to cause confusion,
16 and to mislead and deceive the purchasing public into believing that the products
17 Defendants sell are directly sponsored by, authorized, by, associated with, or
18 originate from Kellytoy.

19 49. As further evidence of Dan-Dee's intent to trade upon Kellytoy's
20 goodwill in Kellytoy's Squishmallows line of plush toys, Defendants repurposed
21 one of Dan-Dee's numerous old trademarks, i.e. SQUISHY, used in the past on very
22 different plush toys for use in connection with the Infringing Plush.

23 50. Defendants, by their unauthorized copying and use of Kellytoy's
24 Squishmallow Designs and Squishmallow Trade Dress, have engaged and will
25 engage in acts of copyright infringement, unfair competition, unlawful
26 appropriation, unjust enrichment, wrongful deception of the purchasing public, and
27 unlawful trading on Kellytoy's good will and the public acceptance of Kellytoy's
28 original works. Defendants' activities have damaged and will continue to damage

1 the reputation, business and good will of Kellytoy nationally and in this judicial
2 district.

3 51. Upon information and belief, unless enjoined by the Court, Defendants
4 will continue and further escalate their infringing activities.

5 52. Kellytoy has no adequate remedy at law. Thus said activities of
6 Defendants have caused and, if not enjoined, will continue to cause irreparable,
7 immediate and impending harm and damage to Kellytoy's business, and to the
8 business, business reputation and good will of Kellytoy.

9 **FIRST CAUSE OF ACTION**

10 **(Federal Copyright Infringement -- 17 U.S.C. §501)**

11 (Against all Defendants)

12 53. Kellytoy repeats and realleges each and every allegation above as
13 though fully set forth herein.

14 54. Kellytoy owns a valid copyright in the Squishmallow Designs. The
15 Squishmallow Designs are original, decorative, and non-functional. After having
16 had access to Kellytoy's Squishmallow Designs, Defendants, without authorization
17 from Kellytoy, have designed, manufactured, distributed, advertised, offered for sale
18 and/or sold the Infringing Plush unicorn design depicted in **Exhibit 7** bearing a
19 design that Defendants copied from the Squishmallow Designs.

20 55. All of the Squishmallow Designs were originally created by Kellytoy
21 or were assigned to and are owned by Kellytoy.

22 56. The Squishmallow Designs comprise original works of authorship that
23 may be copyrighted under United States law. In fact, Kellytoy has complied with
24 requirements of Title 17 of the United States Code with respect to the registration of
25 Kellytoy's unicorn Squishmallow Designs depicted in **Exhibit 2**, as evidenced by
26 United States Copyright Registration Nos. VA0002096020 and VA0002093075,
27 entitling Kellytoy to the exclusive rights and privileges in and to the above-
28 referenced copyrights. These copyright registrations are valid and subsisting.

1 57. Defendants have imitated, displayed, reproduced, distributed, and/or
2 created derivative works from the subject matter embodied in the Squishmallow
3 Designs in connection with Defendants' manufacture, promotion, and solicitation
4 and acceptance of orders for the sale of Defendants' Infringing Plush unicorn design
5 depicted in **Exhibit 7**.

6 58. Defendants' acts are in violation of the exclusive rights of the copyright
7 holder to reproduce, distribute, display, and create derivative works from the
8 copyrighted Squishmallow Designs, as articulated in 17 U.S.C. § 106. Defendants
9 have thereby infringed Kellytoy's copyrights in the Squishmallow Designs.

10 59. Such activities and conduct has caused Kellytoy injury for which it is
11 entitled to recover under 17 U.S.C. § 504.

12 60. On information and belief, Defendants' infringing acts were committed
13 with knowledge or in reckless disregard of Kellytoy's exclusive rights in the
14 Squishmallow Designs.

15 61. On information and belief, as a result of Defendants' copyright
16 infringement, they have made substantial profits and gains to which they are not
17 entitled to retain.

18 62. As a direct and proximate result of Defendants' unlawful conduct,
19 Defendants have caused and will continue to cause irreparable injury to Kellytoy,
20 for which Kellytoy has no adequate remedy at law. Unless Defendants are
21 restrained by this Court from continuing their imitation, copying, display,
22 distribution, reproduction and creation of derivative works from the works
23 embodied in the copyrighted Squishmallow Designs, these injuries will continue to
24 occur. Accordingly, Kellytoy is entitled to preliminary and permanent injunctions
25 restraining Defendants' infringing conduct, pursuant to 17 U.S.C. § 502.

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27
28

SECOND CAUSE OF ACTION

**(Trademark Infringement, False Designation of Origin and False Description --
15 U.S.C. §1125)**

(Against All Defendants)

63. Kellytoy repeats and realleges each and every allegation of paragraphs 1 through 52 above as if fully set forth herein.

64. The Squishmallow Trade Dress is non-functional and highly distinctive, and has become associated in the public mind with plush toy products of the highest quality and reputation finding their origin in a single source, Kellytoy.

65. Kellytoy owns all right, title and interest in and to the Squishmallow Trade Dress.

66. Without Kellytoy's authorization or consent, and having knowledge of Kellytoy's prior rights in the Squishmallow Trade Dress, Defendants have designed, manufactured, imported, distributed, advertised, offered for sale and/or sold and/or will soon commence importation, distribution, advertising, offers for sale, and sale of replicas of the Squishmallow Trade Dress to the consuming public in direct competition with Kellytoy, in or affecting interstate commerce.

67. The Infringing Plush designs are confusingly similar to the Squishmallow Trade Dress. Defendants' use of the Squishmallow Trade Dress has caused and, unless enjoined by this Court, will continue to cause a likelihood of confusion and deception of members of the public and, additionally, injury to Kellytoy's goodwill and reputation as symbolized by the Squishmallow Trade Dress.

68. Defendants' use and further threatened uses of the Squishmallow Trade Dress thus constitutes trade dress infringement, false designation of origin and unfair competition in violation of 15 U.S.C. § 1125(a).

69. As a direct and proximate result of Defendants' unlawful conduct, Defendants have misappropriated Kellytoy's rights in the Squishmallow Trade

1 Dress, as well as the goodwill associated therewith, and have diverted sales and
2 profits from Kellytoy to Defendants. Thus, as a direct and proximate result of
3 Defendants' acts of willful infringement, Kellytoy has suffered and/or will suffer
4 damage to its valuable brand and reputation, and other damages in an amount to be
5 proven at trial, including Defendants' profits and Kellytoy's lost profits.

6 70. Defendants' actions described above will cause, have caused, and will
7 continue to cause irreparable damage to Kellytoy, unless Defendants are restrained
8 by this Court. Kellytoy has no adequate remedy at law with regard to Defendants'
9 infringing conduct. Accordingly, Kellytoy is entitled to a preliminary and
10 permanent injunction, pursuant to 15 U.S.C. § 1116, restraining and enjoining
11 Defendants' and their agents, servants, and employees, and all persons acting
12 thereunder, in concert with, or on their behalf, from using Kellytoy's Squishmallow
13 Trade Dress, or any colorable imitation or variation thereof, in connection with the
14 sale and/or marketing of any products.

15 71. Defendants' aforesaid acts are exceptional within the meaning of 15
16 U.S.C § 1117.

17 **THIRD CAUSE OF ACTION**
18 **(Common Law Trademark Infringement)**
19 **(Against all Defendants)**

20 72. Kellytoy repeats and re-alleges each and every allegation of paragraphs
21 1 through 52 and 64 through 67 as though fully set forth herein.

22 73. Defendants have violated Kellytoy's exclusive common law rights in
23 the Squishmallow Trade Dress.

24 74. Kellytoy has continuously used its Squishmallow Trade Dress to
25 identify its goods in California and elsewhere, and to distinguish them from goods
26 of a different origin. As such, Kellytoy has common law rights to the Squishmallow
27 Trade Dress.

1 75. Defendants' acts described above constitute trade mark infringement
2 under the common laws of the United States, including California.

3 **FOURTH CAUSE OF ACTION**

4 **(California Common Law Unfair Competition)**

5 (Against all Defendants)

6 76. Kellytoy repeats and re-alleges each and every allegation of paragraphs
7 1 through 52 and 64 through 67 as though fully set forth herein.

8
9 77. This claim arises under the common law of the State of California
10 relating to unfair competition.

11 78. Defendants' Infringing Plush incorporate matter constituting
12 reproductions, copies and colorable imitations of Kellytoy's Squishmallow Trade
13 Dress. Defendants' unauthorized use of Kellytoy's Squishmallow Trade Dress
14 constitutes unfair competition, and is likely to cause confusion and mistake in the
15 minds of the trade and the purchasing public as to the source of the parties' products
16 and to cause purchasers to believe Defendants' products are authentic products of
17 Kellytoy when in fact they are not.

18 79. Upon information and belief, Defendants have intentionally
19 appropriated Kellytoy's Squishmallow Trade Dress with the intent of causing
20 confusion, mistake, and deception as to the source of their goods and with the intent
21 of palming off their goods as those of Kellytoy and to place others in the position to
22 palm off their goods as those of Kellytoy. Defendants have thus committed unfair
23 competition under the common law of the State of California.

24 80. By their actions in infringing Kellytoy's Squishmallow Trade Dress,
25 Defendants are improperly trading upon the reputation and good will of Kellytoy
26 and are impairing Kellytoy's valuable rights in its Squishmallow Trade Dress.

27 81. Upon information and belief, said activities of Defendants alleged
28 herein were and are willful and intentional acts of unfair competition.

83. Upon information and belief, Defendants have engaged in their unlawful conduct alleged herein intentionally, maliciously, fraudulently and oppressively entitling Kellytoy to punitive damages in an amount to be determined at trial.

FIFTH CAUSE OF ACTION

**(California Statutory Unfair Competition –
California Bus. & Prof. Code § 17200, *et seq.*)**

(Against all Defendants)

84. Kellytoy repeats and re-alleges each and every allegation of paragraphs 1 through 52, 64 through 68, 73 through 75, and 77 through 80, as though fully set forth herein.

85. By reason of the foregoing, Defendants have been, and are, engaged in “unlawful, unfair or fraudulent business practices” in violation of California Business and Professional Code Section 17200 *et seq.*

86. Said activities of Defendants have caused and, if not enjoined, will continue to cause irreparable harm and damage to the rights of Kellytoy in its Squishmallow Trade Dress and to its business reputation and good will. Kellytoy has no adequate remedy at law for these wrongs and injuries. The damage to Kellytoy includes harm to its goodwill and reputation in the marketplace that money cannot compensate. Accordingly, Kellytoy is entitled to a preliminary and permanent injunction restraining and enjoining Defendants' and their agents, servants, and employees, and all persons acting thereunder, in concert with, or on their behalf, from using Kellytoy's Squishmallow Trade Dress, or any colorable imitation or variation thereof, in connection with the sale and/or marketing of any

1 products. Kellytoy is further entitled to restitutionary disgorgement of all of
2 Defendants' ill-gotten gains pursuant to California Business and Professions Code §
3 17203 and to recover its costs and attorneys' fees incurred in bringing and
4 prosecuting this action.

5 **PRAYER FOR RELIEF**

6 WHEREFORE, Kellytoy prays for judgment against Defendants as follows:

7 1. That Defendants, their officers, members, directors, agents, servants,
8 employees, successors, licensees, representatives, successors, assigns, and all
9 persons acting in concert or participation with them, be permanently enjoined and
10 restrained from:

- 11 (i) Manufacturing, importing, distributing, advertising, offering to
12 sell or selling the Infringing Plush or any colorable imitations of
13 the Squishmallow Designs and/or Squishmallow Trade Dress;
14 (ii) Using the Squishmallow Trade Dress or any confusingly similar
15 trade dress in connection with plush or other toys;
16 (iii) Using the Squishmallow Trade Dress, or any confusingly similar
17 mark, in connection with the advertisement, offer to sell or sale of
18 any toy products;
19 (iv) Using any false designation of origin, or representing or
20 suggesting directly or by implication that Defendants, or any
21 brands or other sources identifiers created by Defendants, or their
22 toys, are affiliated with, associated with, authorized by, or
23 otherwise connected to Kellytoy, or that Defendants are
24 authorized by Kellytoy to use the Squishmallow Trade Dress or
25 Squishmallow Designs;
26 (v) Copying, distributing, displaying or making derivative works of
27 the Squishmallow Designs;
28

1 (vi) Engaging in any other activity constituting unfair competition
2 with Kellytoy, or constituting infringement of the Squishmallow
3 Trade Dress or Squishmallow Designs; and

4 (vii) Assisting, aiding, or abetting any other person or business entity
5 in engaging or performing any of the activities referred to in
6 subparagraphs (i) through (vi) above, or effecting any
7 assignments or transfers, forming new entities or associations, or
8 utilizing any other device for the purpose of circumventing or
9 otherwise avoiding the prohibitions set forth in subparagraphs (i)
10 through (vi) above.

11 2. That Defendants be directed to file with the Court and serve on
12 Kellytoy, within thirty (30) days after entry of a final injunction, a report in writing
13 under oath setting forth in detail the manner and form in which Defendants have
14 complied with the injunction.

15 3. That the Court direct any third parties providing services to
16 Defendants in connection with any infringing and/or enjoined conduct, including
17 social media platforms (*e.g.*, Instagram, Facebook, Twitter), online marketplaces
18 (*e.g.*, Alibaba, eBay, Etsy, AliExpress, Amazon, Taobao), online payment
19 providers, including credit card companies (*e.g.*, PayPal, Visa) and other service
20 providers (*e.g.*, Google, GoDaddy, LiveChat, Shopify) to cease providing services
21 to Defendants in connection with the offer for sale and sale of the Infringing Plush
22 or any other products using or embodying the Squishmallow Trade Dress or
23 Squishmallow Designs.

24 4. That Defendants be required to pay Kellytoy such damages as it has
25 sustained as a consequence of Defendants' infringement of the of the Squishmallow
26 Trade Dress and trebling of those damages under 15 U.S.C. § 1117;

27 5. Adjudge that each of the Defendants, by its unauthorized use of
28 Kellytoy's the Squishmallow Trade Dress for plush toys, and such other acts as it

1 may have undertaken relating to the Squishmallow Trade Dress, have violated
2 Kellytoy's rights under 15 U.S.C. § 1125(a), under California state law (including,
3 without limitation, Cal. Bus. & Prof. Code § 17200 *et seq.*), and under common law,
4 and that they have done so willfully and for the purpose of violating Kellytoy's
5 rights and damaging Kellytoy's goodwill and reputation in the Squishmallow Trade
6 Dress;

7 6. Direct Defendants to provide Kellytoy with an identification in writing
8 of any and all entities that are presently using the Squishmallow Designs and/or
9 Squishmallow Trade Dress in the United States on Defendants' behalf and inform
10 them that they must immediately cease such use;

11 7. Direct Defendants to immediately recall any and all merchandise
12 previously provided to any United States entity under the Squishmallow Trade
13 Dress or Squishmallow Designs;

14 8. Enter an order, pursuant to 15 U.S.C § 1118, directing Defendants to
15 deliver for destruction all products, brochures, marketing materials, decals, stickers,
16 signs, prints, packages, receptacles, wrappers, boxes, and advertisements in their
17 possession or under their control, bearing any unauthorized copy of any of the
18 Squishmallow Trade Dress, or any simulation, reproduction, counterfeit, copy,
19 confusingly similar likeness, or colorable imitation thereof, and all plates, molds,
20 matrices, programs and other means of making same;

21 9. Enter an order, pursuant to 17 U.S.C. § 503(a), impounding all of
22 Defendants' products that infringe Kellytoy's copyrights in the Squishmallow
23 Designs, as well as any plates, molds, matrices, programs, or other articles by means
24 of which copies of the works embodied in the Squishmallow Designs may be
25 produced;

26 10. Enter an order, pursuant to 17 U.S.C § 503(b), requiring the destruction
27 of all copies of Defendants' products that infringe Kellytoy's copyright in the
28 Squishmallow Designs, as well as any plates, molds, matrices, programs, or other

1 articles by means of which copies of the works embodied in the Squishmallow
2 Designs may be produced;

3 11. That each Defendant provide Kellytoy in writing with the following
4 information relating to Defendants' goods marketed, advertised, offered for sale, or
5 sold under the Squishmallow Trade Dress or Squishmallow Designs:

6 (i) the name, address and telephone number of each and every United
7 States entity to whom Defendants have made available or otherwise
8 provided any such products; and

9 (ii) a full accounting as to the precise dollar amount of such products made
10 available or provided and the profits recognized by Defendants in
11 connection with such actions;

12 12. Direct Defendants to pay the costs of corrective advertising;

13 13. Direct Defendants to pay Plaintiffs' attorneys' fees and costs incurred
14 in initiating and prosecuting this action;

15 14. Direct Defendants to pay punitive damages and exemplary damages
16 according to proof;

17 15. That Kellytoy recover its actual damages, Kellytoy's lost profits, and
18 Defendant's profits arising from Defendants' conduct complained-of herein;

19 16. That the Court award enhanced profits and treble damages;

20 17. That Kellytoy be awarded statutory damages;

21 18. That Kellytoy be awarded interest, including pre-judgment
22 interest, on the foregoing sums;

23 19. That the Court direct such other actions as the Court may deem just and
24 proper to prevent the public from deriving the mistaken impression that any
25 products or services offered, advertised, or promoted by or on behalf of Defendants
26 are authorized by Kellytoy or related in any way to Kellytoy's products or services;

27 20. That Defendants be ordered to disgorge all of their ill-gotten gains
28 pursuant to California Business and Professions Code § 17203; and

3		Respectfully submitted,
4	DATED: March 5, 2019	FREEMAN, FREEMAN & SMILEY, LLP

7 By: / s / Mark B. Mizrahi
8 TODD M. LANDER
9 MARK B. MIZRAHI
10 Attorneys for Plaintiffs
KELLYTOY (USA), INC. and
KELLYTOY WORLDWIDE, INC.

DEMAND FOR JURY TRIAL

Plaintiffs hereby demand and request a trial by jury of all issues raised that are triable by jury.

Respectfully submitted,

DATED: March 5, 2019

FREEMAN, FREEMAN & SMILEY, LLP

By: / s / Mark B. Mizrahi

TODD M. LANDER

MARK B. MIZRAHI

Attorneys for Plaintiffs

KELLYTOY (USA), INC. and

KELLYTOY WORLDWIDE, INC.

EXHIBIT L

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO.:

JAZWARES, LLC, a Delaware
Limited Liability Company, KELLY
TOY HOLDINGS, LLC, a Delaware
Limited Liability Company, KELLY
AMUSEMENT HOLDINGS, LLC, a
Delaware Limited Liability Company,
And JAZPLUS, LLC, a Delaware
Limited Liability Company,

Plaintiff,

vs.

BUILD-A-BEAR WORKSHOP, INC.,
a Delaware Corporation,

Defendant.

VERIFIED EX PARTE EMERGENCY MOTION FOR TEMPORARY INJUNCTION

_____/

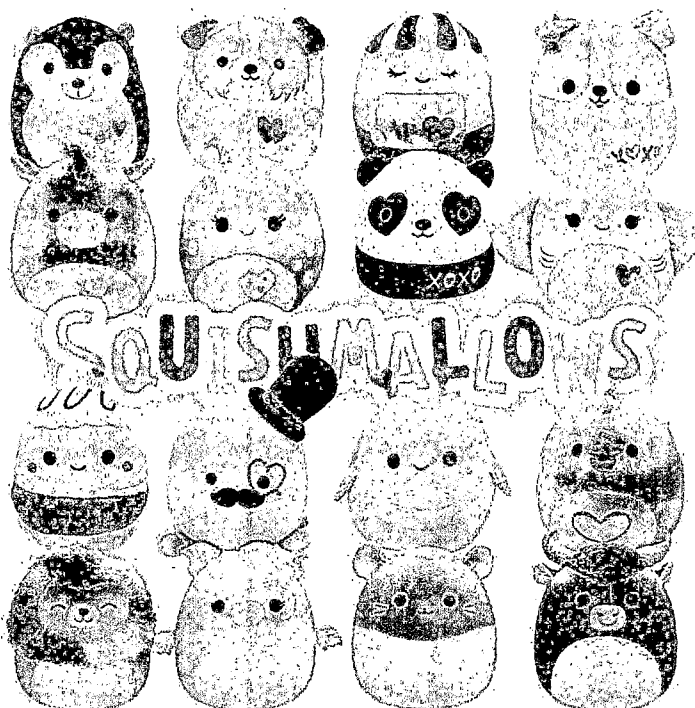
Plaintiffs, Jazwares, LLC, Kelly Toys Holdings, LLC, Kelly Amusement Holdings, LLC,
and Jazplus, LLC (collectively, "Plaintiffs" or "Kelly Toys"), by and through the undersigned
counsel, and pursuant to Rule 1.610(a) of the Florida Rules of Civil Procedure and Florida Statute
§ 501.211, respectfully move this Court to enter an emergency temporary injunction preventing
the continued use and misappropriation of Plaintiffs' trade dress by Defendant, Build-A-Bear
Workshop, Inc. ("Defendant" or "Build-A-Bear"). In support thereof, Plaintiffs state as follows:

I. BACKGROUND

The conduct here is egregious. After being told its conduct was improper by the product manufacturer it used to carry out its bad-acts, Defendant Build-A-Bear has taken and is misusing Plaintiffs' most valuable trade dress. Defendant must be stopped.

a. The World Famous Squishmallows

Plaintiffs (who are either affiliated entities, governed by common ownership, governed by intercompany agreements, or otherwise have the right to sell or otherwise distribute Squishmallows) are among the world's leading manufacturers and distributors of high-quality plush toys and other consumer products. In 2016, their distinctive line of plush toys



branded “Squishmallows” was released. Squishmallows share common, unique features distinguishing them from the goods of others. Often referred to as just “Squish,” these soft, huggable toys immediately appealed to adults and children alike. Consumers throughout the United States began collecting Squishmallows and even started online communities to track the availability of new Squishmallows as they were released. Squishmallows are some of the most well-known and fastest growing toys in the world.

In essence, Kelly Toys' creative development efforts produced an entirely new class of plush toys that has carved a previously non-existent niche in the marketplace. Plaintiff Kelly Toys

Holdings, LLC has been and is the sole owner of all right, title, and interest in and to the Squishmallows products that possess unique, recognizable, and distinguishing features that are common across much of the Squishmallows line. From 2016 to the present, Kelly Toys has expended large sums of money in developing, advertising, and promoting the Squishmallows trade dress, and the product designs embodying Squishmallows, throughout the United States. In fact, Kelly Toys spends approximately \$1,000,000 annually in direct to consumer and business-to-business advertising in connection with its Squishmallows products that are well known (and well loved) for their distinctive look.

Squishmallows have become a phenomenon—they have turned into a collectors' item, with their avid fanbase of all ages searching high and low to collect as many of the over 3,000 different Squishmallows characters as possible. Due to Squishmallows' massive success and popularity, consumers associate the high-quality Squishmallows toys with the Squishmallows distinctive trade dress. For example, The New York Times has proclaimed that "Squishmallows are Taking Over,"¹ Forbes named them "2022's Must-Have Christmas Toy,"² and The Guardian has recognized the toy's rise in popularity on social media, writing that "Squishmallows go from TikTok sensation to top Christmas toy."³ And In September of 2022, Squishmallows was awarded the coveted "Toy of the Year," "Plush Toy of the Year," and the "People's Choice" awards by The Toy Foundation. Squishmallows are so popular that they have been identified as the most popular toy brand across

¹ Taylor Lorenz, *Squishmallows Are Taking Over*, N.Y. Times (March 18, 2021), <https://www.nytimes.com/2021/03/16/style/squishmallows.html>.

² Mark Faithfull, *Squishmallows Going Viral, Warren Buffet and 2022's Must-Have Christmas Toy*, Forbes (Dec. 13, 2022), <https://www.forbes.com/sites/markfaithfull/2022/12/13/squishmallows-going-viral-warren-buffett-and-2022s-must-have-christmas-toy/?sh=692f77db22ad>.

³ Zoe Wood, *Squishmallows Go From TikTok Sensation to Top Christmas Toy*, Guardian (Dec. 9, 2022), <https://www.theguardian.com/business/2022/dec/09/squishmallows-go-from-tiktok-sensation-to-top-christmas-toy>.

41% of the U.S. states—far ahead of other well-known mega brands such as Hot Wheels, Lego, Nintendo Switch, Nerf, and Play-Doh. There are only just a few of the countless recognitions received by Squishmallows.

Kelly Toys sells a broad range of Squishmallows products featuring the iconic trade dress, and whose overall look and image—and in particular but without limitation its shapes, colors, textures, and graphics—serve as a distinctive source identifier to the consuming public. Though not easily reduced to writing, these features include: (1) substantially egg/bell shaped plush toys depicting various similarly shaped fanciful renditions of animals/characters; (2) simplified Asian style Kawaii faces with repeating and complementary rounded/oval shaped graphics depicting features on the characters themselves (such as eyes, snouts and bellies) and which conform to and support the overall egg/bell shape of the toys; (3) embroidered facial features, such as eyes, nostrils, and/or mouths; (4) distinctive contrasting and non-monochrome coloring; and (5) short-pile exterior (collectively, the “Squishmallows Trade Dress”). Simply stated, the Squishmallows Trade Dress, when viewed as a whole, presents a non-functional look that is *uniquely* associated with Squishmallows.

Due to the distinctive Squishmallows Trade Dress, coupled with the unique designs, extensive marketing efforts, media coverage, and market penetration, the Squishmallows trade dress has acquired distinctiveness in the marketplace when applied to plush toys. In fact, because of Kelly Toys’ extensive promotional activities and widespread display of plush toys embodying the Squishmallows Trade Dress directed to the public, and as a consequence of Kelly Toys’ well-earned reputation for fairness and integrity in dealings with its customers, the relevant consuming public has come to recognize and associate plush toys embodying the Squishmallows Trade Dress as high-quality goods connected with or offered by Kelly Toys. As a result, the Squishmallows

Trade Dress has valuable goodwill and consumer recognition associated with it and has come to symbolize the exemplary reputation of Kelly Toys.

b. Plaintiffs Vigilantly Protect Their Intellectual Property

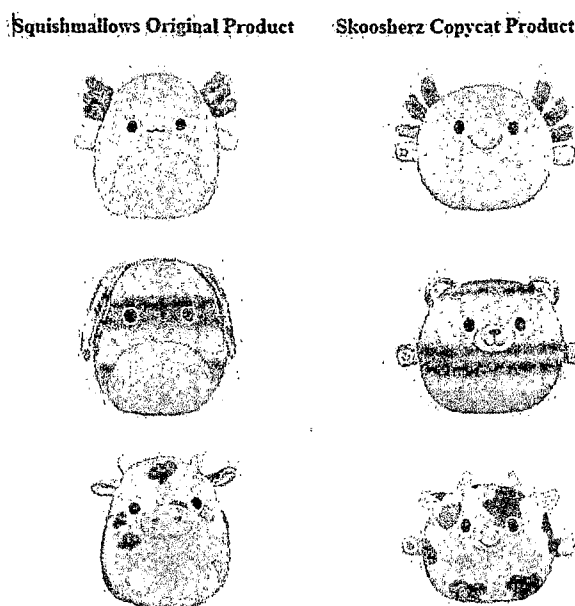
As the creators of sought-after toys such as Squishmallows, Kelly Toys takes steps to ensure that their intellectual property is protected. And, when this information is misappropriated, Kelly Toys will stop at no length to prevent the dissemination of its sought-after information. As recently as July 2021, Plaintiff Jazwares, LLC (a partial owner and affiliate of Kelly Toys) secured an emergency injunction **in this Court** against a former employee after the former employee stole Jazwares, LLC's protected trade secrets. *Jazwares, LLC v. Cymonda Wilson*, CACE21014464 (Fla. 17th Jud. Cir.).

This case is no different. Kelly Toys Holdings, LLC contracted with a Chinese Manufacturer that has the sole rights to manufacture Squishmallows (the "Manufacturer Contract"). A true and correct copy of the Manufacturer Contract is attached hereto as **Exhibit 1**. As seen by the Manufacturer Contract, Kelly Toys Holdings, LLC included robust trade dress protections. Little did Kelly Toys Holdings, LLC know that Build-A-Bear would clandestinely discover the identity of Kelly Toys' Squishmallows manufacturer and ask the manufacturer to use Squishmallows Trade dress to create a near identical Squishmallows copycat under the Build-A-Bear brand. Consequently, Build-A-Bear had previously used this manufacturer and used its monetary influence over the manufacturer to pressure the manufacturer into building the copycat goods. But, the manufacturer knew that creating Skoosherz was wrong and initially pushed back. It told Build-A-Bear that the products it was asking for were very close to the famed and protected Squishmallows. Build-A-Bear ignored this caution, asserting that it was not improper to copy these items because they were sold to the public, directing the manufacturer to build the copycat goods.

Uneasy about the situation, the manufacturer reached out to a Kelly Toys representative and informed them about the above referenced correspondence, which the manufacturer claims is memorialized in three (3) emails that Build-A-Bear wants hidden from Kelly Toys (thus highlighting the need for the *ex parte* nature of this Motion).

c. Build-A-Bear’s Blatant Misappropriation of Squishmallows

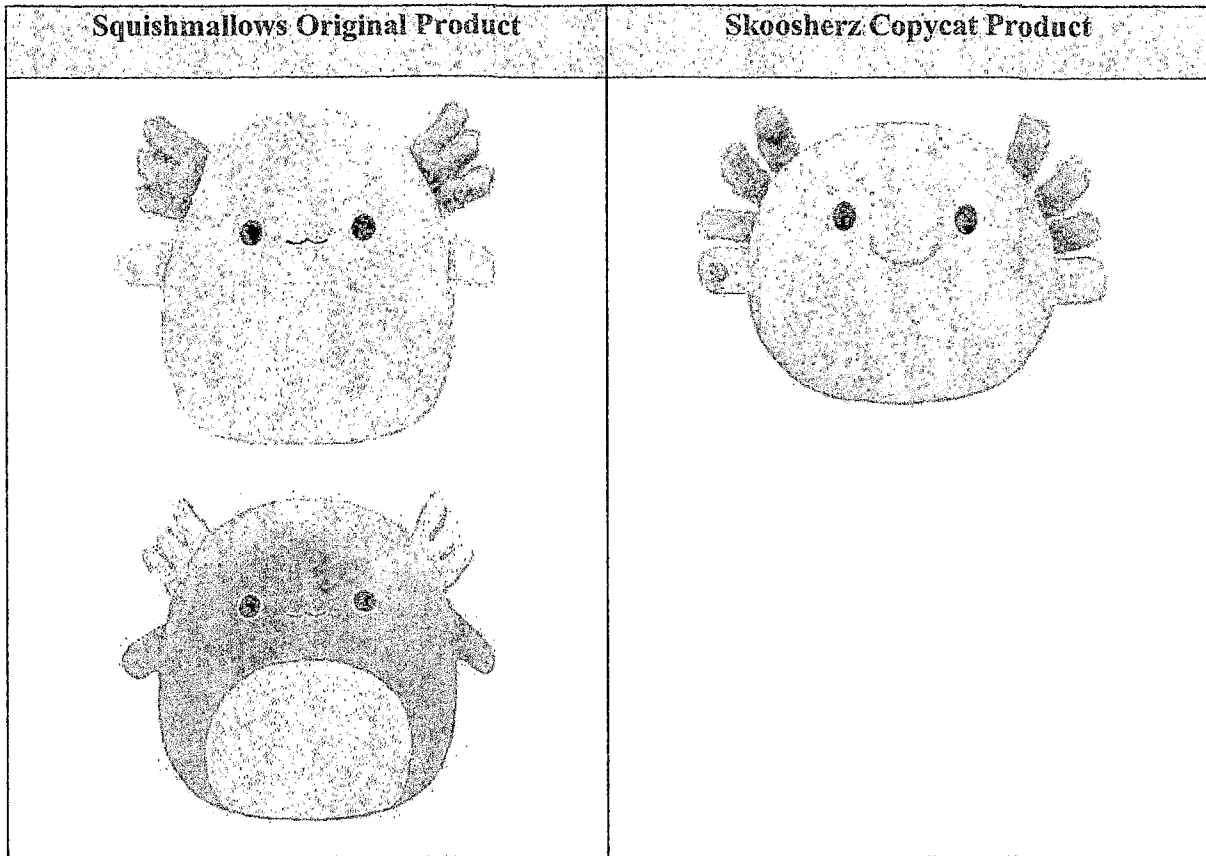
Rather than competing fairly in the marketplace by creating its own unique concepts and products, Defendant Build-A-Bear, a company worth over 300 million dollars, decided that it would be easier to simply copy, imitate, and profit off of the popularity and goodwill of Squishmallows. Its goal: confuse consumers into buying Build-A-Bear’s products instead of Kelly Toys’ products. Specifically, in January 2024, Defendant Build-A-Bear announced the release of its “Skoosherz” plush toys—toys that look exactly like the well-known Squishmallows:

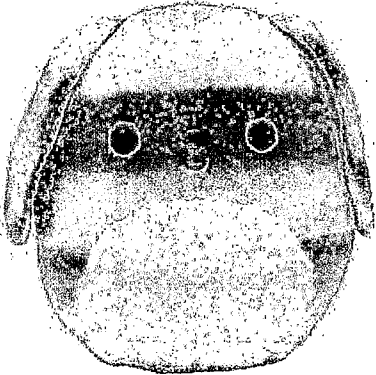
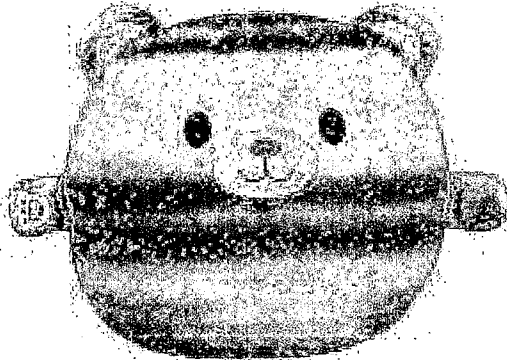
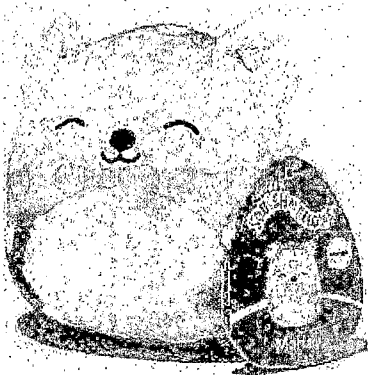
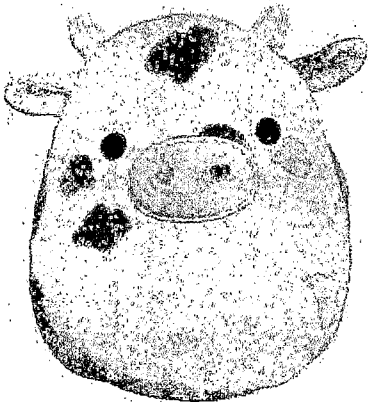
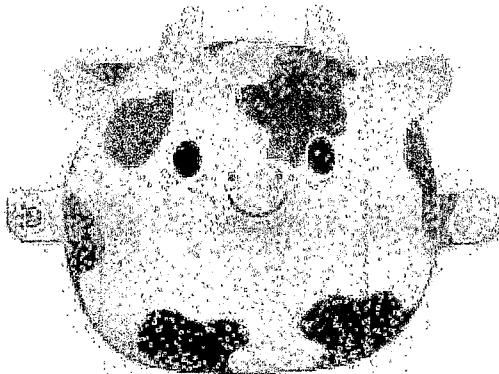


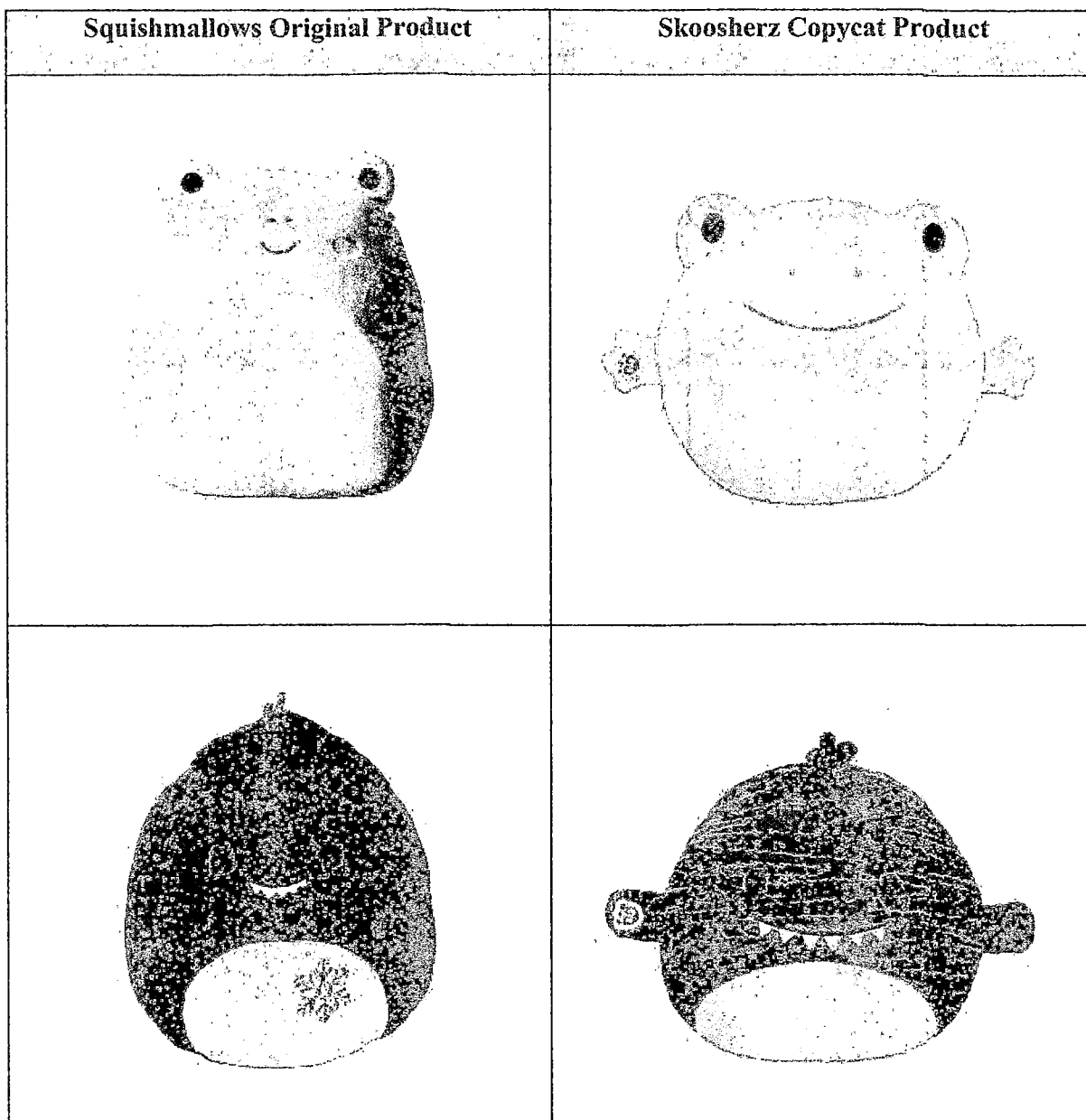
Further demonstrating the misconduct here is the fact that Build-A-Bear is not even in the business of selling completely assembled plush toys like Squishmallows. Instead, Build-A-Bear is best known for providing a place for people to create their own customizable toys, offering a

number of unstuffed plush animals and characters that consumers can stuff themselves to build their own toy. Nonetheless, n January 11, 2024, Build-A-Bear launched “Skoosherz,” a line of already complete (stuffed, stitched, etc.) plush toys that copies and imitates Squishmallows. Build-A-Bear does not just copy the shape, material and general characteristics of Squishmallows, Build-A-Bear went design by design and made an almost exact replica of each Squishmallows design; Squishmallows has a rainbow bear, Build-A-Bear made a rainbow Skoosherz; Squishmallows has a green frog, Build-A-Bear made a green frog Skoosherz; Squishmallows has a pink cow, Build-A-Bear made a pink cow Skoosherz. This list goes on and is not complete. Dinosaurs, axolotls, and soon vegetables—Build-A-Bear made sure that each of its original five Skoosherz was an exact copy of a popular Squishmallows character. This includes the beloved and extremely unique Squishmallows axolotl, which Build-A-Bear ensured to copy with precision. Simply stated, instead of maintaining its original business practice of allowing consumers to create their own toys, Build-A-Bear now seeks to trade off the goodwill of Squishmallows by marketing obvious copycat products—plush toys that look almost identical to popular Squishmallows.

Skoosherz toys have the *same* distinctive trade dress as the popular Squishmallows, including: shaped fanciful renditions of animals/characters; simplified Asian style Kawaii faces; embroidered facial features; distinctive and non-monochrome coloring; and short-pile exterior. Side by side comparisons of Squishmallows and the copycat Skoosherz products plainly show how striking the similarities are:



Squishmallows Original Product	Skoosherz Copycat Product
	
	
	



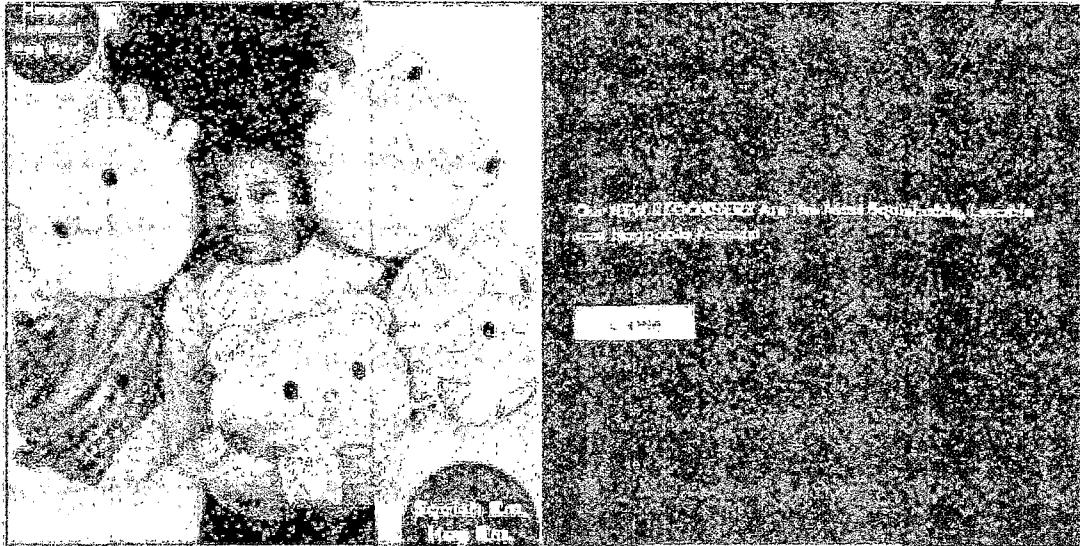
Even worse, and as briefly detailed above, Build-A-Bear not only parroted Squishmallows, but it also tricked Squishmallows' manufacturer into creating the infringing Skoosherz copycat products. Specifically, Build-A-Bear reached out to the Squishmallows manufacturer (with whom Kelly Toys has an airtight confidentiality contract) and asked the manufacturer to create a Squishmallows look-alike. Plaintiffs are informed and believe that when the manufacturer expressed concerns that the Skoosherz sought to be manufactured were Squishmallows copycats,

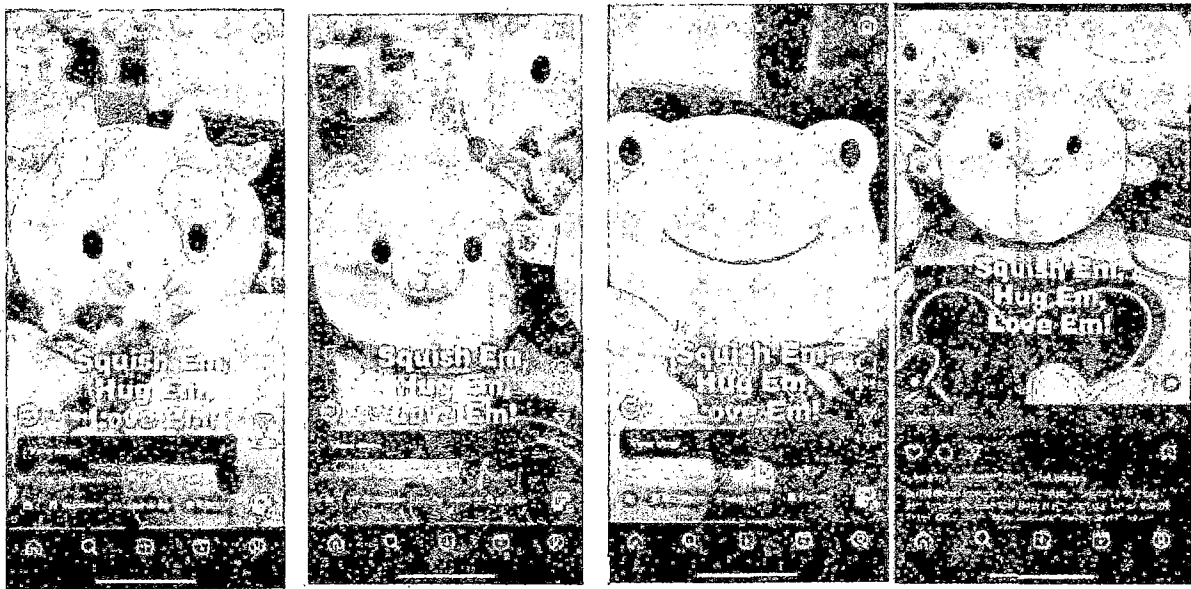
Build-A-Bear brazenly ignored this caution, instead asserting, contrary to law, that its copycat products were permitted. Build-A-Bear then told the manufacturer to proceed with producing the violative goods. There can only be one explanation for Build-A-Bear's insistence on both using the same manufacturer as Squishmallows and proceeding with its copycat product despite the manufacturer's warning: Build-A-Bear intended on misappropriating the Squishmallows Trade Dress and hoped to leverage Squishmallows' confidential information in the manufacturer's possession.

d. Build-A-Bear's Actions Have Caused Great Customer Confusion

Not only has Build-A-Bear created Skoosherz to visually and tactilely mirror Squishmallows, but Build-A-Bear has also tried to trick customers looking for Squishmallows into buying Skoosherz instead. By naming its products that so closely resemble Squishmallows "Skoosherz," Build-A-Bear has taken steps to ensure that customers seeking out Squishmallows (often referred to as "Squish") are mistaken by the confusingly similarly named Skoosherz instead.

Build-A-Bear has sought to market off of this confusion by portraying its Skoosherz as the "most squishable," and advertising that consumers can "Squish Em," plainly seeking to create an association between the infringing Skoosherz and the wildly popular Squishmallows, or "Squish:"

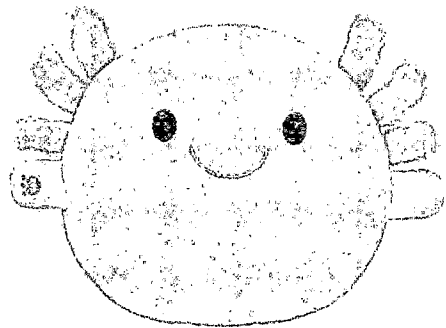




Build-A-Bear’s descriptions of individual Skoosherz toys similarly seek to associate with Squishmallows, noting that they are “squishable.” For example, the product details for Build-A-Bear’s axolotl (a copy of the unique animal that is one of Squishmallows’ most popular characters) state:

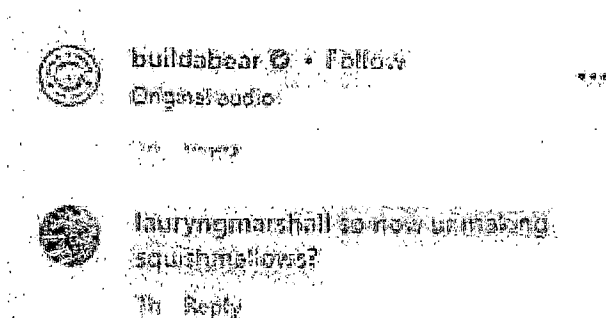


Q



Product Details	Specifications	Gift Options	Store Availability
<p>Skoosherz are our most squishable, lovable and huggable friends! Our fan favorite pink axolotl gets the Skoosherz treatment with this adorable plush. The large, round plush has the axolotl's signature smiley face with fuzzy pink gills on its side. Make a splash with this ultra huggable axolotl friend!</p>			

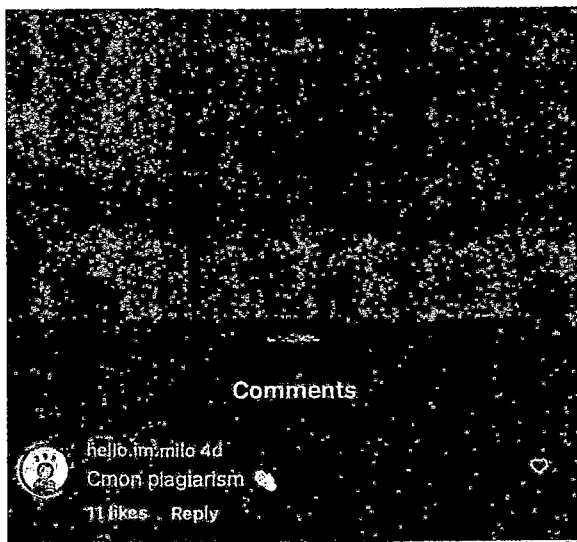
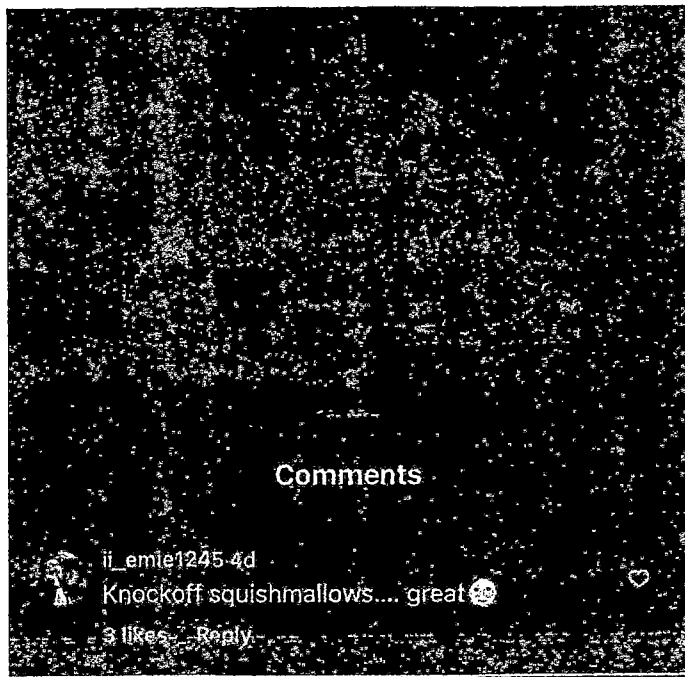
Skoosherz products create a likelihood of confusion with Squishmallows products. In fact, there is evidence of *actual* consumer confusion. For example, on a recent promotional Skoosherz Instagram post, a user asked whether Build-A-Bear was now making Squishmallows:

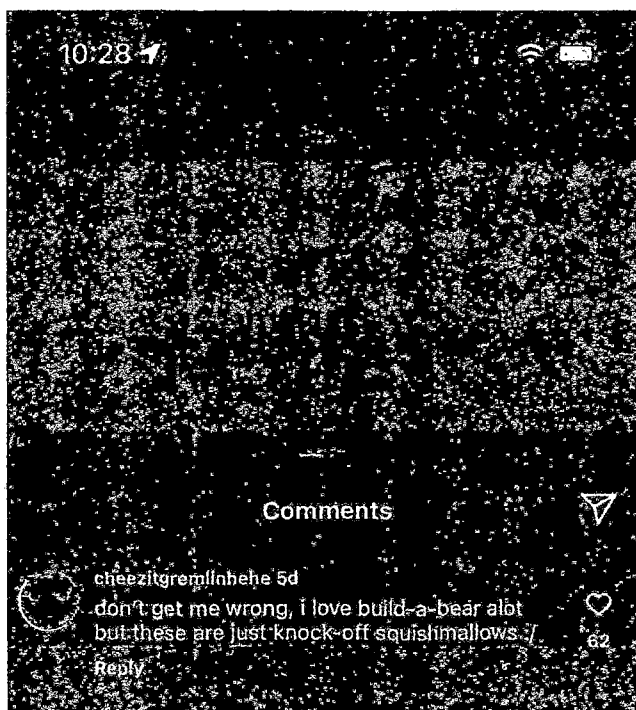


Other consumers have also noted how similar Skoosherz are to Squishmallows. Indeed, as shown below, the official Build-A-Bear Instagram account was forced to clarify that these were indeed Skoosherz, not Squishmallows, when a commenter posted “SQUISHMALLOW!? !?” to Build-A-Bear’s promotional video of Skoosherz:

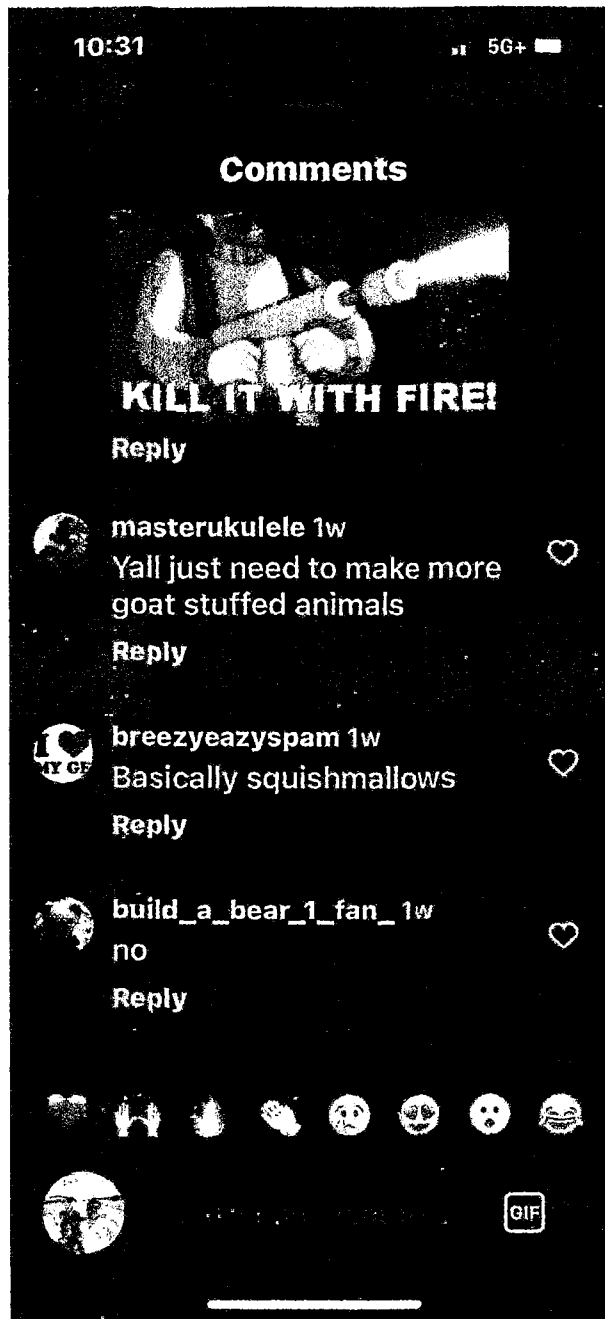


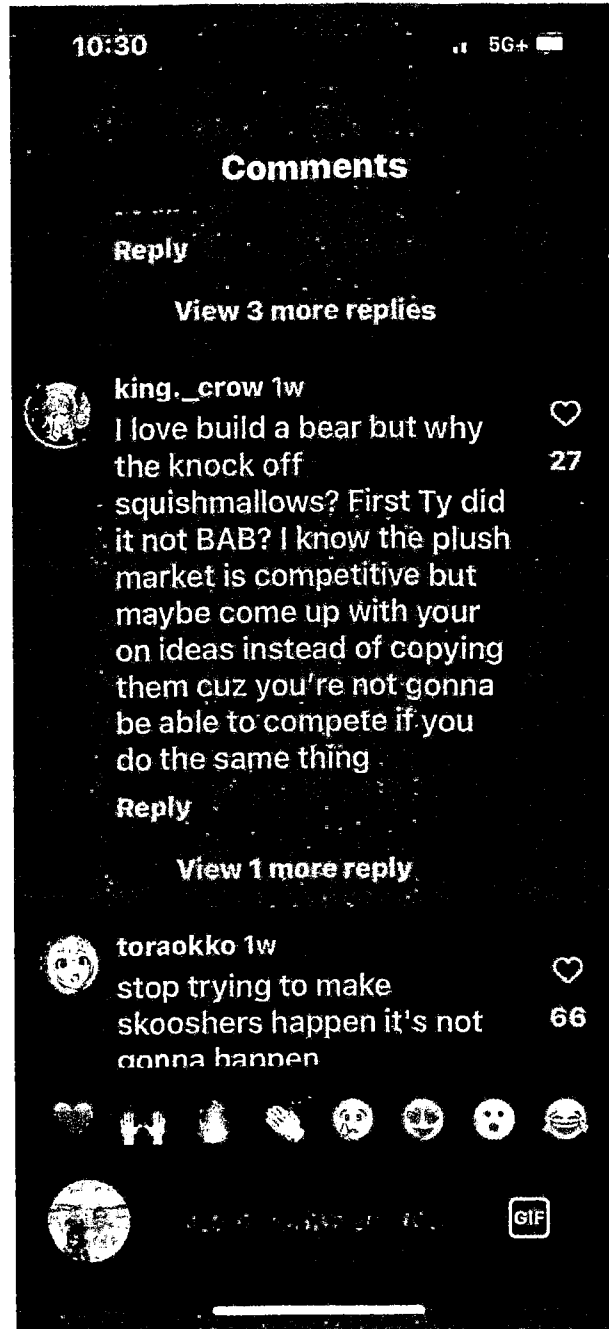
These users were not alone. Build-A-Bear's Instagram post announcing its new Skoosherz line is riddled with posts calling them "knockoff Squishmallows" and noting the obvious similarities between these new products and the well-known Squishmallows:

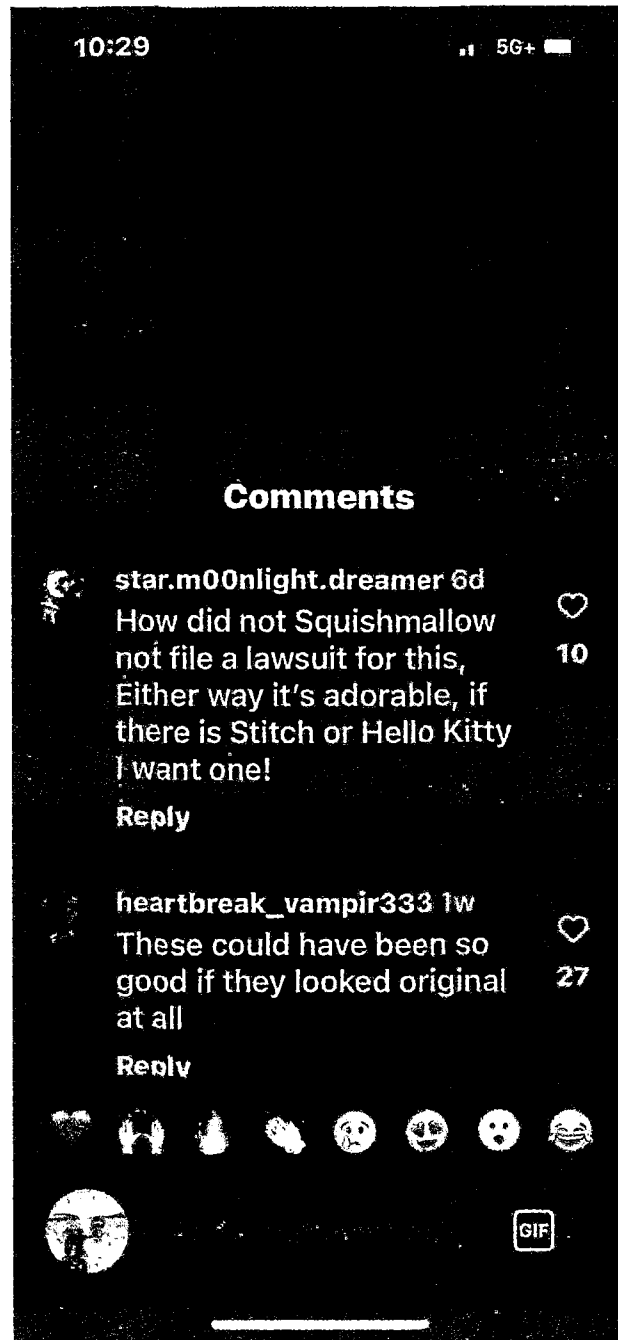












Other consumers noted that Skoosherz are “like a worse Squishmallow,” even noting that Skoosherz chose to copy several of the most popular Squishmallows characters. Still others highlight the fact that Skoosherz represent a radical departure from Build-A-Bear’s traditional model of building a custom toy, referring to them as “soulless ripoff[s]”:



lairviniaa • 10 hr. ago

I'm sorry but I really can't see the appeal. I like I collect both squishmallows and bab but these designs are just lazy and look like cheap squishmallow knockoffs (they literally used the most popular squishmallow animals/designs) and like I don't understand why they'd make these (besides wanting an easy cash grab) they have none of the features that make babs special and unique. they didn't even make clothes for them and they're overpriced too (and imo they're not even cute 😔) I mean if you enjoy them I'm happy for you I don't wanna ruin the fun but its just a no from me



stabby_coffin_salt • 2 days ago

It's like a worse Squishmallow. I'd rather just get one of those Squishem's or whatever they're called (they have one that's a plague doctor).

These knockoffs remind me of those TY squish things. Can't stand the lack of quality or thought.

The cow is kinda cute I guess?



177



Reply



Share



saredarebear • 4 hr. ago

I feel like if they were going to make something resembling squishmallows they could at least make it so you "build" it and make a line of clothing for it so it does not feel like such a soulless ripoff. It's cute, but Build a Bear has something that is pretty unique and I do not understand why these were released the way they were.



3



Reply



Share

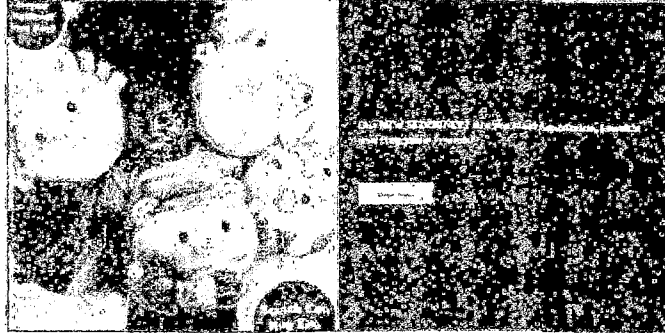


Even Build-A-Bear’s photos and ad campaigns directly mirror Squishmallows:

Squishmallows

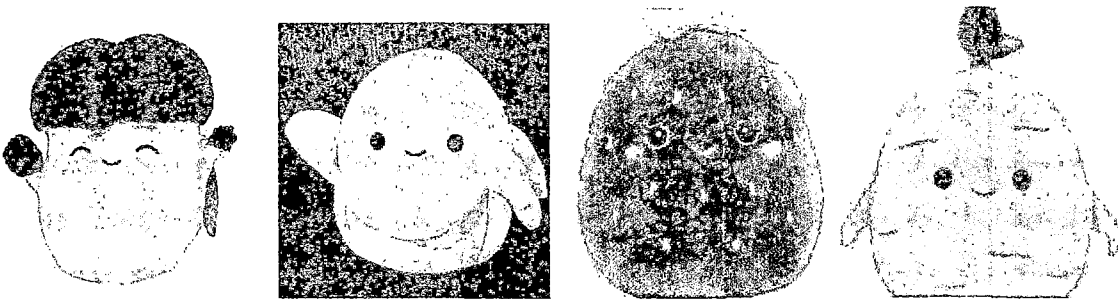


Skoosherz



e. Build-A-Bear Has New Copycats in the Works

Kelly Toys also has reason to believe that Build-A-Bear is working to roll out multiple new Scoosherz characters by mid-2024, including fruits and vegetables Scoosherz (which it will likely accelerate if notice is given). As seen below, Squishmallows' has long produced a popular line of fruit and vegetable Squishmallows:



It is evident that Build-A-Bear's actions have caused and will continue to cause significant harm. As a result of consumer confusion, Kelly Toys has lost and will continue to lose potential customers, sales, and market share. It is important to note that Scoosherz have only been around for just over two weeks. If the foregoing confusion ensued within this short time, imagine what would happen if Scoosherz remained on the market indefinitely.

II. STANDARD ON AN EX PARTE TEMPORARY INJUNCTION

a. Notice Standard

Rule 1.610 of the Florida Rules of Civil Procedure governs the imposition of temporary injunctions and states “[a] temporary injunction may be granted without written or oral notice to the adverse party only if: (A) it appears from the specific facts shown by affidavit or verified pleading that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and (B) the movant’s attorney certifies in writing any efforts that have been made to give notice and the reasons why notice should not be required.” Fla. R. Civ. P. 1.610(a)(1).

“To satisfy the rule’s mandate of establishing why notice should not be required, a Plaintiff seeking an ex parte temporary injunction must demonstrate (1) how and why the giving of notice would accelerate *or* precipitate the injury or (2) that the time required to notice a hearing would actually permit the threatened irreparable injury to occur.” *Smith v. Knight*, 679 So. 2d 359, 361 (Fla. 4th DCA 1996) (citing *Dixie Music Co. v. Pike*, 135 Fla. 671, 185 So. 441, 446 (1938); *Lieberman v. Marshall*, 236 So. 2d 120, 125 (Fla. 1970); *Minimatic Components, Inc. v. Westinghouse Elec. Corp.*, 494 So. 2d 303, 304 (Fla. 4th DCA 1986); *Shouman v. American Express Travel Related Servs. Co.*, 566 So. 2d 875 (Fla. 3d DCA 1990). “Examples of such a showing are where notice of a hearing will prompt a defendant to destroy records, cause unsecured assets to be liquidated in the context of a fraudulent enterprise, or precipitate the disposal of the major asset of a partnership subject to an accounting.” *Smith*, at 361-62 (footnotes omitted). *See also Tobin et al v. Hanna et al*, 2012 WL 12335474 (Fla. 17th Cir., August 8, 2012) (ruling that permitting the defendant to receive notice will likely precipitate additional fraudulent activities and stated grounds for an *ex parte* preliminary injunction).

b. Injunction Standard

In seeking a temporary injunction, the movant must show: (1) irreparable harm if the status quo is not maintained; (2) no adequate remedy at law; (3) a clear legal right to the relief requested; (4) that any public interest will not be disserved; and (5) a substantial likelihood of success on the merits. *Shafer v. Shafer*, 898 So. 2d 1053, 1055 (Fla. 4th DCA 2005) (citing to *Wexler v. Lepore*, 878 So. 2d 1276, 1281 (Fla. 4th DCA 2004), *rev. denied*, 888 So. 2d 625).

III. DEFENDANT'S ACTIONS ARE SUFFICIENT TO ENTITLE KELLY TOYS TO AN EX PARTE TEMPORARY INJUNCTION

a. Injunctions Are Justified to Protect intellectual Property

Injunctions are viable relief in the context of trademark infringement or misappropriation, and because trade dress claims are a form of trademark claim, state common law trade dress claims draw largely upon the state common law for infringement of trademarks. *See M&E Distributors v. Worley*, 840 So. 2d 457, 459 (Fla. 4th DCA 2003) (finding that enjoining a competitor's use of a registered mark will protect the public interest and constitutes an irreparable injury as a matter of law) (citing to *Callaway Golf Co. v. Golf Clean, Inc.*, 915 F. Supp. 1206, 1215 (M.D. Fla. 1995) ("In trademark infringement cases, irreparable harm is presumed."); *Laboratorios Roldan, C. por A. v. Tex Int'l, Inc.*, 902 F. Supp. 1555, 1571 (S.D. Fla. 1995) (granting a temporary injunction for unfair competition and trademark infringement, recognizing that the likelihood of confusion constitutes irreparable injury as a matter of law); *Stagg Shop of Miami, Inc. v. Moss*, 120 So. 2d 39, 40–41 (Fla. 2d DCA 1960) (explaining that monetary damages an insufficient remedy for trademark infringement). Common law trade dress claims are evaluated under a similar analysis as claims under the Lanham Act. *See, e.g., Planetary Motion, Inc. v. Techsplosion, Inc.*, 261 F.3d 1188, 1193 (11th Cir. 2001) (evaluating common law unfair competition/trademark claim under Lanham Act framework and noting "[c]ourts may use an analysis of federal infringement claims

as a ‘measuring stick’ in evaluating the merits of state law claims of unfair competition”). The term trade dress refers to “the appearance of a product when that appearance is used to identify the producer.” *Dippin’ Dots, Inc. v. Frosty Bites Distribution, LLC*, 369 F.3d 1197 (11th Cir. 2004). “‘Trade [d]ress’ involves the total image of a product and may include features such as size, shape, color . . . , texture, graphics, or even particular sales techniques.” *AmBrit, Inc. v. Kraft, Inc.*, 812 F.2d 1531 (11th Cir. 1986). To prevail on a claim for trade dress infringement, a party must prove that: “(1) the product design of the two products is confusingly similar; (2) the features of the product design are primarily non-functional; and (3) the product design is inherently distinctive or has acquired secondary meaning.” *Dippin’ Dots, Inc.*, 369 F.3d 1197.

That the elements of infringement are met here is unquestionable. **First**, the similarity of these products is irrefutable. The photos referenced herein make clear that Skoosherz are Squishmallows by a different name. **Second**, the features are non-functional. The items at issue are plush toys—functionality is not a focus. The unique shape and design of Squishmallows are not essential to their “use” and do not increase their cost or quality. *See e.g., Niles Audio Corp. v. OEM Sys. Co., Inc.*, 174 F. Supp. 2d 1315, 1318 (S.D. Fla. 2001)(“A functional characteristic is one that is ‘essential to the use or purpose of the article or [one that] affects the cost or quality of the article.’ ‘There is no bright line test for functionality.’ ‘The question of whether features are nonfunctional is one of fact.’”) citing *Epic Metals Corp. v. Souliere*, 99 F.3d at 1039. **Third**, Squishmallows have taken the world by storm because of their creative, cute, and quite original Asian-style Kawaii faces, rounded shape, embroidered facial features, bright colors, small facial features, small appendages, and overall unique minimalistic depiction of cute animals and shapes. The onslaught of consumers correctly identify Skoosherz as Squishmallows in the many social media posts herein. The fact that consumers are referring to Build-A-Bear’s copycat product as

Squishmallows leaves little doubt that Squishmallows have a secondary meaning in the marketplace.

By way of example, in *M&E Distributors*, the court affirmed the entry of an injunction after the defendant began producing a product that “utilized the same distinctive color, shaped bottle, and label appearance as” the plaintiff’s product. 840 So. 2d at 458–49. Similarly here, an injunction should be granted because (as noted above) Build-A-Bear infringed on the Squishmallows Trade Dress by creating and selling Skoosherz, which share the same or substantially similar appearance as Squishmallows.

b. An Injunction is Proper Under Florida’s Deceptive and Unfair Trade Practices Act

A party is entitled to an injunction as a result of a violation of Florida’s Deceptive and Unfair Trade Practices Act (“FDUTPA”). § 501.211(1), Fla. Stat. (“Without regard to any other remedy or relief to which a person is entitled, anyone aggrieved by a violation of this part may bring an action . . . to enjoin a person who has violated, is violating, or is otherwise likely to violate this part.”). FDUTPA makes unlawful “[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce[.]” § 501.204(1), Fla. Stat. “Trade dress or trademark infringement is an ‘unfair and deceptive trade practice that constitutes a violation of FDUTPA.’” *Lanard Toys Ltd. v. Dolgencorp, LLC*, 2021 WL 8200197, at *32 (M.D. Fla. Aug. 20, 2021), as corrected (Oct. 19, 2021), supplemented, 3:15-CV-849-MMH-PDB, 2022 WL 1597276 (M.D. Fla. Feb. 2, 2022) citing *Commodores Ent. Corp. v. McClary*, 324 F. Supp. 3d 1245, 1252 (M.D. Fla. 2018) (trademark), *aff’d*, 822 F. App’x 904 (11th Cir. 2020); *see also Niles Audio Corp. v. OEM Sys. Co., Inc.*, 174 F. Supp. 2d 1315, 1317 (S.D. Fla. 2001). The Eleventh Circuit has explained, “[c]ommon law and statutory trademark infringements are merely specific aspects of unfair competition.” *Planetary Motion*, 261 F.3d at

1193 n.5; *see also TracFone Wireless, Inc. v. GSM Group, Inc.*, 555 F. Supp. 2d 1331, 1338 (S.D. Fla. 2008) (citing *Laboratorios Roldan v. Tex Int'l Inc.*, 902 F. Supp. 1555, 1569–70 (S.D. Fla. 1995) (explaining that intentionally palming off or passing off products is the type of behavior which FDUTPA was meant to protect against); *see also Niles Audio Corp.*, 174 F. Supp. 2d at 1318 (plaintiff stated a claim for FDUTPA violation based upon trade dress infringement).

In *Laboratorios Roldan*, the court found that the plaintiff had a substantial likelihood of success on the merits in its FDUTPA claim stemming from the defendants' trademark and trade dress infringement of plaintiffs' cosmetics products that were sold in commerce. 902 F. Supp. 1555. In granting the plaintiff's motion for preliminary injunction, the court expressly found that the defendants' "intentional[] palming or passing off their products as those of Plaintiff or someone associated with Plaintiff . . . is the type of behavior which [FDUTPA] was designed to protect." 902 F. Supp. at 1570.

Plaintiffs are similarly entitled to injunctive relief here based on Build-A-Bear's deceptive and unfair practice of misleading consumers by misappropriating the Squishmallows Trade Dress. Build-A-Bear launched "Skoosherz," a line of plush toys that perfectly copies and imitates Squishmallows. The resulting deception in the marketplace is not a secondary result, but rather, was Build-A-Bear's primary goal. Skoosherz toys have the same distinctive trade dress as the popular Squishmallows, including: shaped fanciful renditions of animals/characters; simplified Asian style Kawaii faces; embroidered facial features; and distinctive and non-monochrome coloring. As a result of Defendant's infringement, Plaintiffs have suffered and continue to suffer irreparable harm.

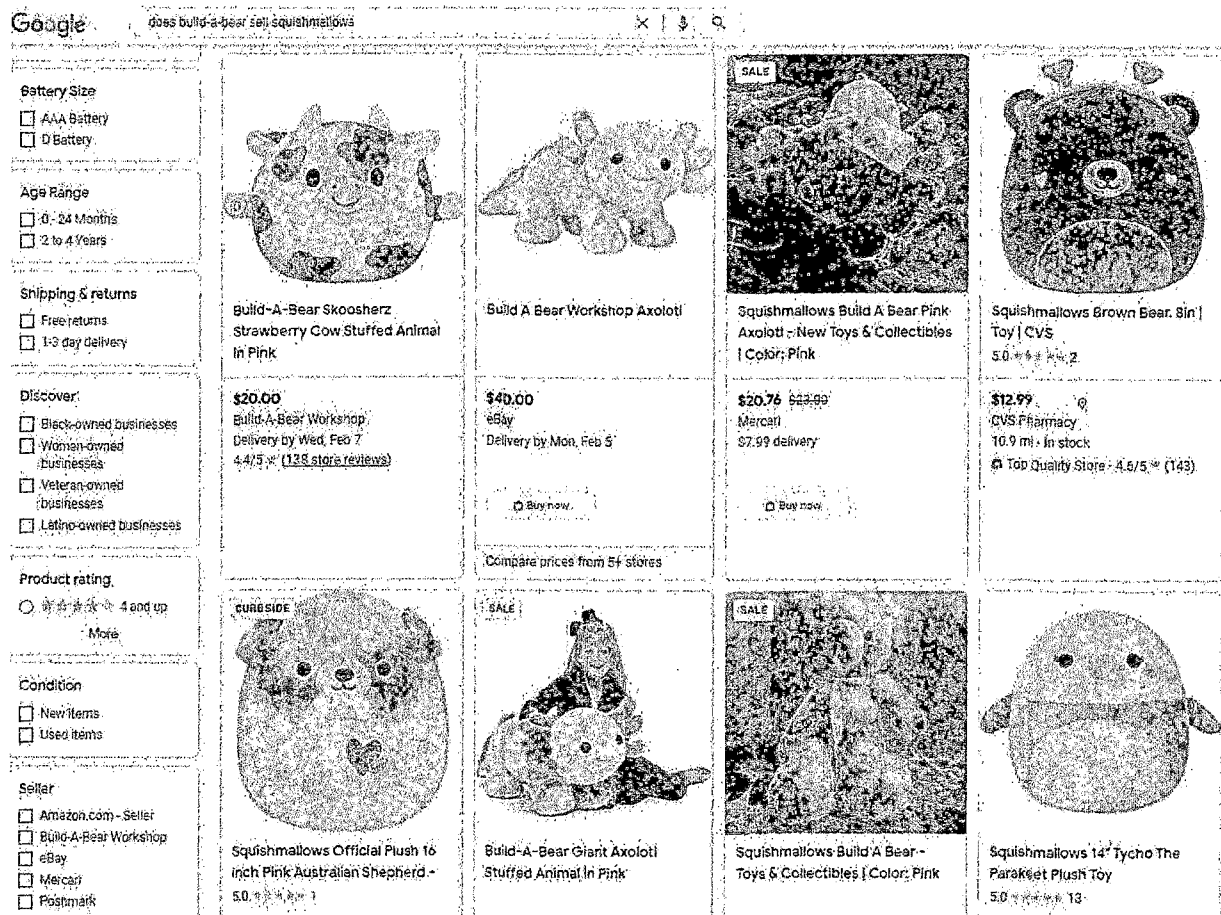
c. Defendant's Actions will Result in Continuing and Irreparable Harm to Plaintiffs' Name and Business

Defendant's actions have caused Kelly Toys substantial harm. Harm, which is irreparable, ongoing, and for which there is no adequate remedy at law. In the short amount of time Defendant has been marketing and selling Skoosherz, Kelly Toys has already lost business and public confusion is at an all-time high. If Defendant is permitted to continue its conduct, it will undoubtedly cause continued irreparable harm. Kelly Toys respectfully request that this Court enter an injunction to preserve the Squishmallows Trade Dress.

Defendant is knowingly misappropriating the Squishmallows Trade Dress. Defendant is improperly advertising in a way to trick consumers into believing Build-A-Bear is part of the Squishmallows brand. It is not. Through these actions, Defendant is causing consumer confusion and misleading the public by selling Skoosherz with the infringed Squishmallows Trade Dress.

There is little to no chance that an injunction will cause Defendant any damage whatsoever. Every day that Defendant is permitted to continue its deceptive actions gives Kelly Toys customers reason to purchase Skoosherz instead of Squishmallows. Giving Defendant notice of Kelly Toys' request for an injunction against Build-A-Bear's prohibited activities may well cause Build-A-Bear to destroy any evidence of using the Squishmallows Trade Dress and/or hide evidence of harmful conduct.

An injunction will not disserve the public interest. Instead, it will protect the public from the wide spread confusion caused by Build-A-Bears bad acts. If these two products were side by side, a consumer would not be able to tell the difference. In fact, if a consumer were to perform a web-search to see if Build-A-Bear sells Squishmallows, the search result would yield both products side by side and indistinguishable, with some retailers calling Skoosherz, "Build-A-Bear Squishmallows."



Kelly Toys has a substantial likelihood of success on the merits of their case against Build-A-Bear. In fact, Build-A-Bear's misappropriation and deceptive tactics here are more blatant than actions that this Court's has previously found to lead to a substantial likelihood of success on the merits in intellectual property misappropriation. *See, e.g., Designer Eyes, Inc. v. Sevan Ayvazian, et al.*, CACE22002457 (Fla. 17th Jud. Cir. March 4, 2022); *Jazwares, LLC v. Cymonda Wilson*, CACE21014464 (Fla. 17th Jud. Cir. July 21, 2021); *Designer Eyes, Inc. v. Michael Goodfriend, et al.*, CACE1911361 (Fla. 17th Jud. Cir. June 3, 2019). If Build-A-Bear is permitted to continue copying Squishmallows, it would turn trade dress law on its head. The jury in this case will be made up of the same people who have expressed confusion about these products in social media

posts. There is a substantial likelihood that the ultimate verdict in this case will affirm that confusion and yield positive results for Kelly Toys.

Kelly Toys has an absolute legal right to enforce its intellectual property rights and demand the cease of the use of the Squishmallows Trade Dress. If Defendant is given notice of this Motion and Plaintiffs' Complaint, the danger of Defendant taking additional fraudulent actions designed to harm Plaintiffs and the public is "real and not merely speculative." *Tobin*, 2012 WL 12335474 at *2.

IV. CONCLUSION

Plaintiffs are entitled to emergency *ex parte* relief. The harm caused by Defendant's actions to Plaintiffs greatly outweighs any potential harm to Defendant. In addition, Plaintiffs have no adequate remedy at law as their damages will result from the destruction of a meticulously built brand with near impossible consumer recognition. Therefore, monetary damages will not sufficiently compensate Plaintiffs for their losses.

WHEREFORE, Plaintiffs respectfully requests this Court and enter an emergency *ex parte* temporary injunction, requiring that Defendant:

1. Immediately cease manufacturing, distributing, advertising, offering to sell or selling its infringing products or any colorable imitations of the Squishmallows Trade Dress, including, but not limited to, any Skoosherz products;
2. Immediately cease using the Squishmallows Trade Dress or any confusingly similar trade dress in connection with plush or other toys including, but not limited to, any Skoosherz products;

3. Immediately cease using the Squishmallows Trade Dress, or any confusingly similar trade dress, in connection with the advertisement, offer to sell, or sale of any toy products including, but not limited to, any Scoosherz products;
4. Immediately cease using imitations of the Squishmallows Trade Dress in connection with plush toys or other goods including, but not limited to, any Scoosherz products;
5. Immediately cease infringing or contributing to infringement of Kelly Toys Holdings, LLC's trade dress, or otherwise engaging in unfair competition with Kelly Toys in any manner or engaging in any conduct tending to falsely represent or likely to confuse, mislead, or deceive suppliers, purchasers, or any member of the public into thinking that Defendant or any of their products are affiliated with Kelly Toys or that Kelly Toys has otherwise sponsored, approved, or licensed any products or services of Defendant including, but not limited to, any Scoosherz products;
6. Immediately cease engaging in any other activity constituting unfair competition with Kelly Toys, or constituting infringement of the Squishmallows Trade Dress including, but not limited to, the sale of any Scoosherz products; and
7. Immediately cease assisting, aiding, or abetting any other person or business entity in engaging or performing any of the activities referred to in subparagraphs (1) through (6) above, or effecting any assignments or transfers, forming new entities or associations, or utilizing any other device for the purpose of circumventing or otherwise avoiding the prohibitions set forth in subparagraphs (1) through (6) above;
8. Be directed to file with the Court and serve on Kelly Toys, within thirty (30) days after entry of a final injunction, a report in writing under oath setting forth in detail the manner and form in which Defendant has complied with the injunction;

9. Preserve any and all communications with the manufacturer of Skoosherz, including but not limited to, communications with the Squishmallows' Chinese manufacturer;
10. Preserve any and all internal communications as well as communications with franchisees, affiliates, and subsidiaries about Skoosherz, their creation, manufacturing, sale, design, origin, name, and future; and
11. And any further relief this Court deems just and proper.

STATEMENT OF WHY NO NOTICE SHOULD BE REQUIRED

The undersigned counsel hereby certifies on this 29th day of January, 2024, pursuant to Rule 1.610 of the Florida Rules of Civil Procedure, that Plaintiffs have made no attempt to provide notice to Defendant, and that this Motion is made *ex parte* for the reasons stated below.

Kelly Toys suffers immeasurable and insurmountable harm is every day that Build-A-Bear is permitted to sell these misappropriated products. The social media posts about Skoosherz on Instagram alone have over sixteen thousand (16,000) likes and 300 comments in just over two weeks. This means that between other marketing, social media, and retail marketing, every day that passes yields tens of thousands of people who are subject to confusion. Providing notice would cause additional incalculable harm.

In addition (and concerning) Build-A-Bear has already shown a willingness proceed with producing its Skoosherz products, despite warnings from its manufacturer that these were Squishmallows copycats. As noted above, Build-A-Bear reached out to the manufacturer of Squishmallows (in China) and asked the manufacturer to make the violative products. When the manufacturer expressed concerns that the items were a Squishmallows copycat, Build-A-Bear first incorrectly represented that such copycat products were permitted because the products were sold

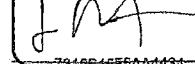
in the public domain, and then sent another correspondence directing the manufacturer and produce the violative goods. The manufacturer indicated that emails were confidential.

In other words, the last time Build-A-Bear was given notice of potential wrongdoing, they pushed ahead and demanded the production of more products—86,000 units to be exact. The communications between Build-A-Bear and the manufacturer are only within the possession of Build-A-Bear and a Chinese manufacturer. While the manufacturer told Kelly Toys of Build-A-Bear's conduct, it would be near impossible to force the manufacturer produce the correspondence. Moreover, there is a concern that once Build-A-Bear receives notice it will try to improperly remove the case to federal court to temporarily divest this Court of jurisdiction pending remand, in order to delay the process. Simply stated, because of (1) the fact that the last time Build-A-Bear was given notice, it proceeded in-spite of the notice it to produce and launch nearly 90,000 of the violative products (2) the potential that Build-A-Bear may destroy information that is otherwise unobtainable if it is given notice, and (3) the risk that Build-A-Bear will attempt to delay any hearing by (improperly) removing the case to federal court before any hearing, this motion must be heard and considered *ex-parte*.

VERIFICATION

I declare under penalty of perjury that I have read the foregoing Verified *Ex Parte* Emergency Motion For Temporary Injunction, and the facts contained herein, are true and correct to the best of my knowledge.

DocuSigned by:




January 29, 2024 | 11:07 AM EST

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Jazwares, LLC

By: Jack Elum

Its: Authorized Representative

DocuSigned by:



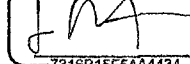
January 29, 2024 | 11:07 AM EST

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Kelly Toys Holdings, LLC

By: Jack Elum

Its: Authorized Representative

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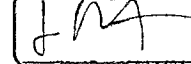
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Kelly Amusement Holdings, LLC

By: Jack Elum

Its: Authorized Representative

DocuSigned by:



January 29, 2024 | 11:07 AM EST

7316B15F5AA4434
Jazplus, LLC

By: Jack Elum

Its: Authorized Representative

Respectfully submitted this 29th of January, 2024, contemporaneous with Plaintiff's

Complaint Verified by:

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Fla. Bar No.: 111620
LAUREN N. PALEN, ESQ.
Fla. Bar No.: 1038877

**IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA**

CASE NO.:

JAZWARES, LLC, a Delaware
Limited Liability Company, KELLY
TOYS HOLDINGS, LLC, a Delaware
Limited Liability Company, KELLY
AMUSEMENT HOLDINGS, LLC, a
Delaware Limited Liability Company,
And JAZPLUS, LLC, a Delaware
Limited Liability Company,

Plaintiff,

vs.

BUILD-A-BEAR WORKSHOP, INC.,
a Delaware Corporation,

Defendant.

_____ /

VERIFIED COMPLAINT

Plaintiffs, Jazwares, LLC, Kelly Toys Holdings, LLC, Kelly Amusement Holdings, LLC,
and Jazplus, LLC (collectively, "Plaintiffs" or "Kelly Toys"), by and through the undersigned
counsel, hereby sue Defendant, Build-A-Bear Workshop, Inc. ("Defendant" or "Build-A-Bear"),
and, for their Complaint, Plaintiffs state the following:

INTRODUCTION

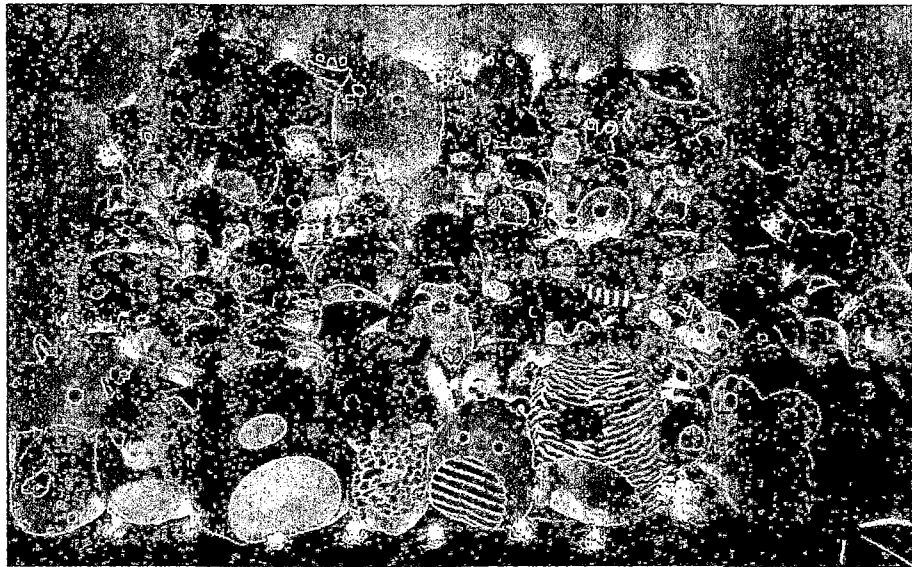
1. The facts of this case are truly concerning.
2. Plaintiffs (who are either affiliated entities, governed by common ownership,
governed by intercompany agreements, or otherwise have the right to sell or otherwise distribute
Squishmallows) are among the world's leading manufacturers and distributors of high-quality toys
and other consumer products. In 2016, their distinctive line of plush toys branded

[2532761/4]

1

“Squishmallows” was released. Often referred to as just “Squish,” these soft, huggable friends immediately appealed to adults and children alike. Consumers throughout the United States began collecting Squishmallows and even started online communities to track the availability of new Squishmallows as they were released. Celebrities like Lady Gaga and Kim Kardashian have posted their collections of Squishmallows on social media. And major American publications, including *The New York Times*, have profiled the broad popularity of the Squishmallows products worldwide. As one consumer remarked about her Squishmallows plush: “It just brings me happiness and that warm and fuzzy feeling.”¹

3. Squishmallows have become a phenomenon, rapidly experiencing breakaway success and quickly turning into a coveted collectors’ item with an avid fanbase. Rather than competing fairly in the marketplace by creating its own



unique concepts and product lines, Defendant Build-A-Bear, a company worth over 300 million dollars, decided that it would be easier to simply copy, imitate, and profit off of the popularity and goodwill of Squishmallows, all in the hopes of confusing consumers into buying Build-A-Bear’s

¹ Taylor Lorenz, *Squishmallows Are Taking Over*, N.Y. Times (March 16, 2021), <https://www.nytimes.com/2021/03/16/style/squishmallows.html>.

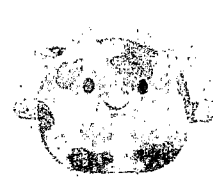
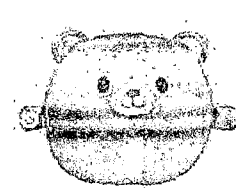
products instead. Build-A-Bear is even using the same manufacturer as Squishmallows in an attempt to gain access to the Squishmallows trade dress.

4. In January 2024, Build-A-Bear announced the release of its “Skoosherz” plush toys. As seen herein, the Skoosherz toys have the same distinctive trade dress as the popular Squishmallows, including: shaped fanciful renditions of animals/characters;

Squishmallows Original Product



Skoosherz Copycat Product



simplified Asian style Kawaii faces; embroidered facial features; distinctive and non-monochrome coloring; and short-pile exterior. And, likely noticing that consumers refer to Squishmallows as Squish, Build-A-Bear named its line Skoosherz to evoke an association with the word “Squish.”

5. Even worse, Build-A-Bear has been trying to trick customers in the marketplace who are looking for Squishmallows into buying their own Skoosherz instead. Indeed, the similarities have not gone unnoticed—immediately upon the launch of Skoosherz, multiple media outlets have already referred to Skoosherz as “Squishmallow-like” and “Squishmallow-adjacent.”² Consumers have likewise taken no time to identify Build-A-Bear’s attempt to replicate the

² Josh Coulson, *Build-a-Bear Reveals Its Squishmallow-Like Skoosherz Line*, (Jan. 11, 2024), <https://www.thegamer.com/build-a-bear-squishmallow-like-skoosherz/>.

Squishmallows trade dress, commenting that Skoosherz are “like a worse Squishmallow” and that Build-A-Bear is “just trying to copy Squishmallow[s]” and is “ripping off Kellytoys.” Others have noted that Skoosherz “look like cheap squishmallow knockoffs,” even expressing that “they literally used the most popular squishmallow animals/designs.”

6. Build-A-Bear’s efforts have created substantial and actual confusion even in the short time that they have been available. For example, a confused consumer asked on the Build-A-Bear Instagram post announcing its newest line, Skoosherz, “so now ur making squishmallows?”

7. Build-A-Bear’s actions have already caused significant harm. For example, customer confusion has and will continue to lead to lost potential customers, sales, and market share.

8. For these reasons and those that follow, this is a straightforward case of trade dress infringement. Kelly Toys Holdings, LLC owns the popular and distinctive trade dress in Squishmallows, and Build-A-Bear is willfully infringing those trade dress rights. Through this action, Kelly Toys seeks monetary and injunctive relief to stop Build-A-Bear’s copycat efforts and put an end to consumer confusion.

PARTIES, JURISDICTION, & VENUE

9. This is an action for injunctive relief and damages in excess of fifty thousand dollars (\$50,000.00), exclusive of attorneys’ fees and costs.

10. Plaintiff Kelly Toys Holdings, LLC is a Delaware limited liability company with its principal place of business in Los Angeles, California.

11. Plaintiff Jazwares, LLC is a Delaware limited liability company with its principal place of business in Broward County, Florida.

12. Plaintiff Kelly Amusement Holdings, LLC is a Delaware limited liability company with its principal place of business in Syosset, New York.

13. Plaintiff Jazplus, LLC is a Delaware limited liability company with its principal place of business in Broward County, Florida.

14. Plaintiffs are either affiliated entities, governed by common ownership, governed by intercompany agreements, or otherwise have the right to sell or otherwise distribute Squishmallows.

15. Defendant Build-A-Bear is a consumer toy corporation company organized under the laws of Delaware with its principal place of business in St. Louis, Missouri.

16. Defendant Build-A-Bear is subject to the jurisdiction of this Court pursuant to Florida Statutes Section 48.193(1)(a)(1) because it operates, conducts, engages in, and carries on a business venture in Broward County, Florida. Specifically, Build-A-Bear is registered to do business in Florida and has over twenty locations in Florida where Build-A-Bear sells its products, including the infringing Skoosherz. The infringing Skoosherz are also available for order online via Build-A-Bear's website and pick up at physical locations in Florida. In order to sell Skoosherz in Build-A-Bear's Florida branches, the infringing articles were either manufactured in or shipped to Florida.

17. Venue is proper in this Court pursuant to Florida Statute § 47.051 in that Defendant Build-A-Bear has numerous stores located in this county and in that Plaintiff Jazwares, LLC is headquartered in this county, giving rise to injuries sustained in this county.

FACTS

A. World Famous Squishmallows

[2532761/4]

18. Kelly Toys is an innovative and highly successful creator, manufacturer, distributor, and seller of unique plush toys, including its Squishmallows line of plush toys under the Squishmallows brand.

19. In 2016, Kelly Toys conceived of and began creating its Squishmallows line of plush toy designs that share common, unique features distinguishing them from the goods of others. In essence, these creative development efforts produced an entirely



new class of plush toys that has carved a previously non-existent niche in the marketplace.

20. From 2016 to the present, Kelly Toys has expended large sums of money in developing, advertising, and promoting the Squishmallows trade dress, and the product designs embodying it, throughout the United States. In fact, Kelly Toys spends approximately \$1,000,000 annually in direct to consumer and business-to-business advertising in connection with its Squishmallows products that are well known (and well loved) for their distinctive look.

21. On March 31, 2020, non-party Kellytoy Worldwide, Inc., the previous holder of the trade dress rights at issue, assigned all legal title to the distinctive trade dress associated with the Squishmallows products to Plaintiff Kelly Toy Holdings, LLC. Accordingly, Kelly Toys Holdings, LLC has been and is the sole owner of all right, title, and interest in and to the Squishmallows products (including the Squishmallows trade dress discussed herein) that possess

unique, recognizable, and distinguishing features that are common across much of the Squishmallows line.

22. Kelly Toy Holdings, LLC provides the rights to the remaining Plaintiffs, Jazwares, LLC, Kelly Amusement Holdings, LLC, and Jazplus, LLC, to sell and distribute the Squishmallows products. Plaintiffs are all related companies that each independently have the ability to inspect and monitor the Squishmallows products and to maintain the products' quality. Each Plaintiff thus has a cognizable interest in the infringement at issue.

B. Squishmallows Has a Distinctive Trade Dress

23. Kelly Toys sells a broad range of Squishmallows products featuring the iconic trade dress, and whose overall look and image—and in particular but without limitation its shapes, colors, textures and graphics—serve as a distinctive source identifier to the consuming public.

Though not easily reduced

to writing, these features

include: (1) substantially egg/bell shaped plush toys

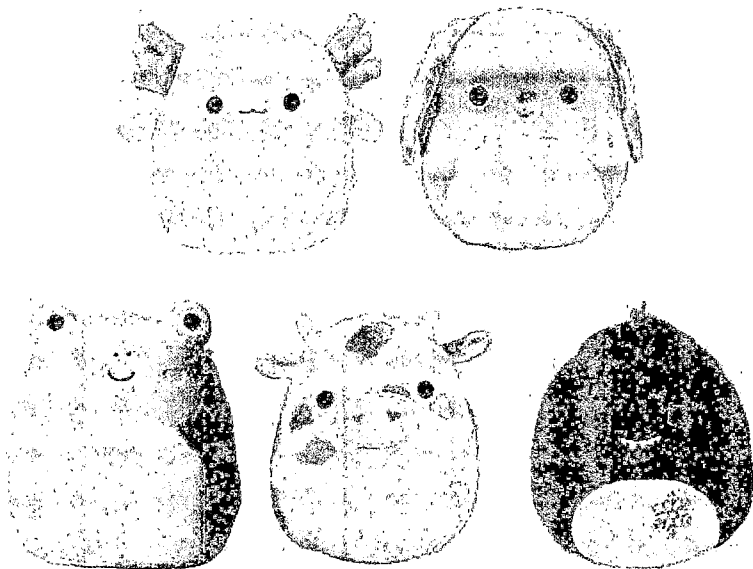
depicting various similarly

shaped fanciful renditions of

animals/characters; (2)

simplified Asian style

Kawaii faces with repeating



and complementary rounded/oval shaped graphics depicting features on the characters themselves (such as eyes, snouts, and bellies) and which conform to and support the overall egg/bell shape of the toys; (3) embroidered facial features, such as eyes, nostrils, and/or mouths; (4) distinctive

contrasting and non-monochrome coloring; and (5) short-pile exterior (collectively, the “Squishmallows Trade Dress”).

24. The Squishmallows Trade Dress, when viewed as a whole, presents a non-functional look that is *uniquely* associated with Squishmallows. The aesthetic features of the Squishmallows Trade Dress do not have utilitarian functionality, as evidenced and underscored by the following facts: (1) the unique combination of the egg-shaped characters, simplified Kawaii face and repeated egg/bell shapes, embroidered facial features, distinct coloring, and velvety texture yields no utilitarian advantage over other plush toys; (2) there are innumerable alternative stylistic plush toy features available to and used by competitors, including, (i) countless alternative plush toy shapes (e.g. traditional animal designs as opposed to Squishmallows’ whimsical, abstract renditions of animals and characters), (ii) numerous alternative means to depict facial features (e.g. plastic or bead eyes, features emulating realistic animals, countless different facial expressions); (iii) myriad alternative shell materials (e.g. terrycloth, long pile plush, velboa, satin), (iv) countless alternative stuffing materials available (e.g. beans, cotton, hard foam, wool, etc.), and (v) innumerable alternative plush designs and combinations of features actually used and available in the marketplace; (3) even if there were some utilitarian advantages of the Squishmallows Trade Dress, Kelly Toys’ advertising does not tout or market those advantages; and (4) the Squishmallows Trade Dress is not the result from comparatively simple or inexpensive methods of manufactures vis-à-vis other plush toys.

25. Further, Squishmallows Trade Dress, when viewed as a whole, does not have aesthetic functionality, as protection of the specific combination of these aesthetic features would not impose a non-reputation-related competitive disadvantage against competitors. Competitors have successfully used innumerable alternative design elements and combinations of those

elements, and the specific combination of the Squishmallows Trade Dress features does not serve an aesthetic function wholly independent of any source identifying function. To the contrary, the Squishmallows Trade Dress was specifically designed to distinguish—and has succeeded in distinguishing—the source of products embodying the Squishmallows Trade Dress from the source of other toys. Thus, any advantage gained from the specific combination of aesthetic features comprising the Squishmallows Trade Dress is based on Kelly Toys and Squishmallows' reputation, as the specific combination of aesthetic features comprising the Squishmallows Trade Dress is highly distinctive and has become associated in the minds of the consuming public with plush toy products of the highest quality, originating from a single source: Squishmallows.

C. Squishmallows Are Distinctive and Popular

26. Beginning in 2016 and continuing without interruption, Kelly Toys and its predecessor have expended a great deal of time, effort, and money in the promotion of the Squishmallows line. And due to Kelly Toys' distinctive designs, robust marketing efforts, media coverage, and market penetration, the Squishmallows Trade Dress has acquired distinctiveness in the marketplace when applied to plush toys. As a further result of Kelly Toys' extensive promotional activities and widespread display of Squishmallows directed to the public and as a result of Kelly Toys' fairness and integrity mentioned above, the relevant consuming public has come to recognize and associate plush toys embodying the Squishmallows Trade Dress as high-quality goods connected with or offered only by Plaintiffs. The Squishmallows Trade Dress thus embodies valuable goodwill and consumer recognition associated with it. As a result, that trade dress has valuable goodwill and consumer recognition associated with it and has come to symbolize a secondary meaning of the exemplary reputation of Kelly Toys.

27. In addition to being original and inherently distinctive, the Squishmallows Trade Dress is also widely recognized by consumers. A simple Internet search using the Google search engine yields, for example, about 48,100,000 “hits” for the search term “Squishmallows.”

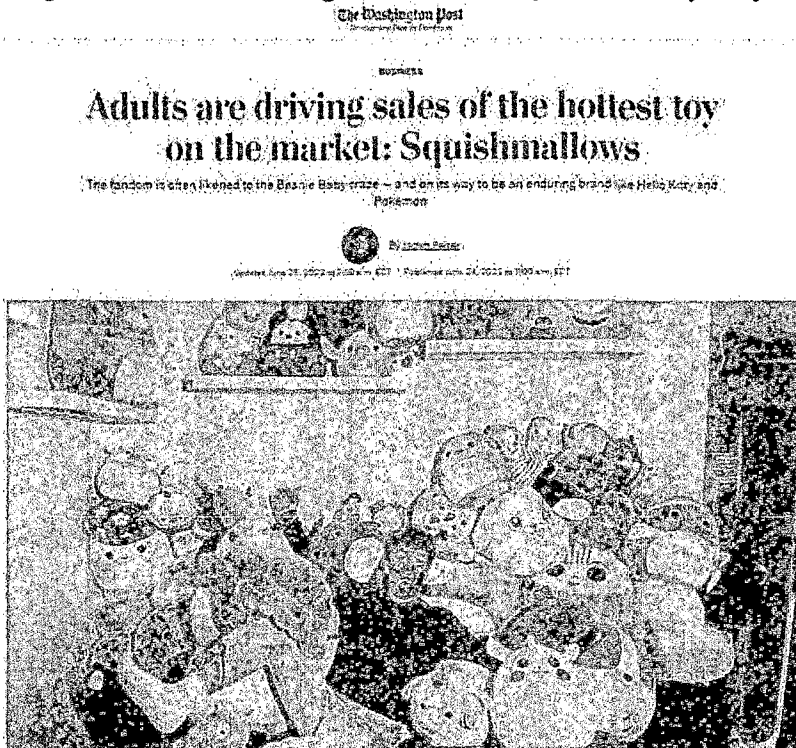
28. Beyond marketing and selling Squishmallows through thousands of retail stores nationwide, Kelly Toys additionally markets and sells its Squishmallows via its website www.squishmallows.com and on www.jazwares.com/brands/squishmallows, which each feature dozens of photographs of its plush toys and models holding its Squishmallows—some of which were directly copied by Build-A-Bear.

29. Kelly Toys also actively engages in promoting its line of Squishmallows products through its numerous social media accounts, including on Instagram, TikTok, Facebook, and Twitter. Indeed, Kelly Toys’ legion of loyal fans of its line of Squishmallows have been extremely engaged on social media, including TikTok, Instagram, and Facebook, demonstrating their awareness and affection for Kelly Toys’ Squishmallows. Squishmallows videos have been viewed more than 11 billion times on TikTok and fans have posted Squishmallows content more than 1 million times on Instagram.

30. Kelly Toys’ Squishmallows have become a phenomenon—they have turned into a collectors’ item, with their avid fanbase of all ages searching high and low to collect as many of the over 3,000 different Squishmallows characters as possible.

31. Indeed, sales of Squishmallows increased over 300% in 2022 alone, with sales soaring to over \$200 million worldwide.

32. Further adding to their recognition and secondary meaning in the marketplace, Squishmallows have been featured in over 300 publications, including magazines, press articles, reviews, and videos, including many mainstream media publications such as the Washington Post, the New York Times, TIME Magazine, Forbes, The Guardian, the New York Post, the Costco Connections Magazine, People Magazine, Seventeen Magazine, and many others. By way of example, the Washington Post characterized Squishmallows as “the hottest toy on the market” and described its avid fanbase as follows: “The fandom is often likened to the Beanie Baby craze — and on its way to be an enduring brand like Hello Kitty and Pokémon.”³



33. The New York Times has proclaimed that “Squishmallows are Taking Over,”⁴ Forbes named Squishmallows “2022’s Must-Have Christmas Toy,”⁵ and The Guardian has

³ Jaclyn Peiser, *Adults Are Driving Sales of the Hottest Toy on the Market: Squishmallows*, Wash. Post. (June 25, 2023), <https://www.washingtonpost.com/business/2023/06/24/squishmallows-toy/>.

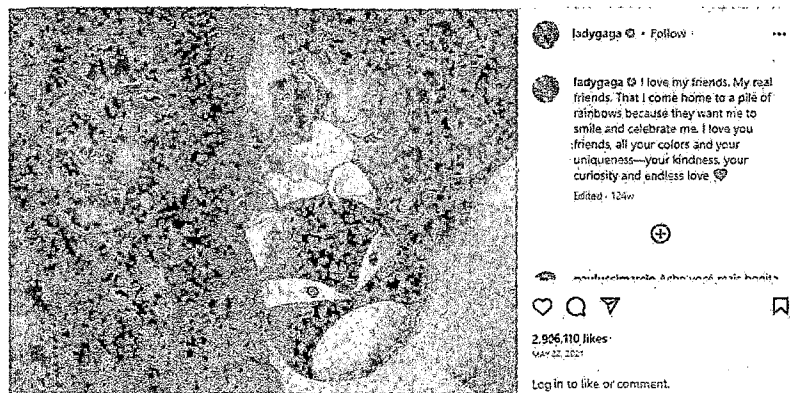
⁴ Taylor Lorenz, *Squishmallows Are Taking Over*, N.Y. Times (March 18, 2021), <https://www.nytimes.com/2021/03/16/style/squishmallows.html>.

⁵ Mark Faithfull, *Squishmallows Going Viral, Warren Buffett and 2022’s Must-Have Christmas Toy*, Forbes (Dec. 13, 2022), <https://www.forbes.com/sites/markfaithfull/2022/12/13/squishmallows-going-viral-warren-buffett-and-2022s-must-have-christmas-toy/?sh=692f77db22ad>.

recognized the toy's rise in popularity on social media, writing that "Squishmallows go from TikTok sensation to top Christmas toy."⁶

34. Squishmallows' widespread popularity is further demonstrated by its recent October 2023 feature on the cover of Costco Connections, the magazine circulated monthly to nearly 15 million Costco members nationwide with advertisements for products sold at Costco, raving that "Squishmallows have taken over the toy world," and that "as toy stores go, the marshmallow-like plush toy's meteoric rise to the top of the \$100 billion global toy market is one for the ages."⁷

35. Squishmallows' fandom ranges across all ages, from children to teens to adults. Even celebrities like Kim Kardashian and Lady Gaga have identified themselves as avid devotees of the brand, and have published messages and photos of their Squishmallows collections on their social media accounts:



⁶ Zoe Wood, *Squishmallows Go From TikTok Sensation to Top Christmas Toy*, Guardian (Dec. 9, 2022), <https://www.theguardian.com/business/2022/dec/09/squishmallows-go-from-tiktok-sensation-to-top-christmas-toy>.

⁷ Mark Caldwell, *Soft Sell*, Costco Connection, Oct. 2023, at 22, https://mobilecontent.costco.com/live/resource/img/static-us-connection-october-23/US_October_Connection_2023.pdf.



36. In September of 2022, Squishmallows was awarded the coveted “Toy of the Year,” “Plush Toy of the Year,” and the “People’s Choice” awards by The Toy Foundation. Squishmallows are so popular that they have been identified as the most popular toy brand across 41% of the U.S. states—far ahead of other well-known mega brands such as Hot Wheels, Lego, Nintendo Switch, Nerf, and Play-Doh.

37. Due to Squishmallows’ massive success and popularity, Squishmallows have created a secondary meaning in the marketplace and consumers associate the high-quality Squishmallows toys with Kelly Toys and the Squishmallows Trade Dress.

D. Build-A-Bear’s Skoosherz as a Copycat of Squishmallows

38. True to its name, Build-A-Bear is best known for providing a place for people to create their own customizable toys. Build-A-Bear offers a number of premade, unstuffed plush animals and characters that consumers can stuff themselves to build their own toy. Consumers

can also customize their plush toy by purchasing audio recordings to incorporate inside the plush toy, clothing for the plush toy, and other accessories.

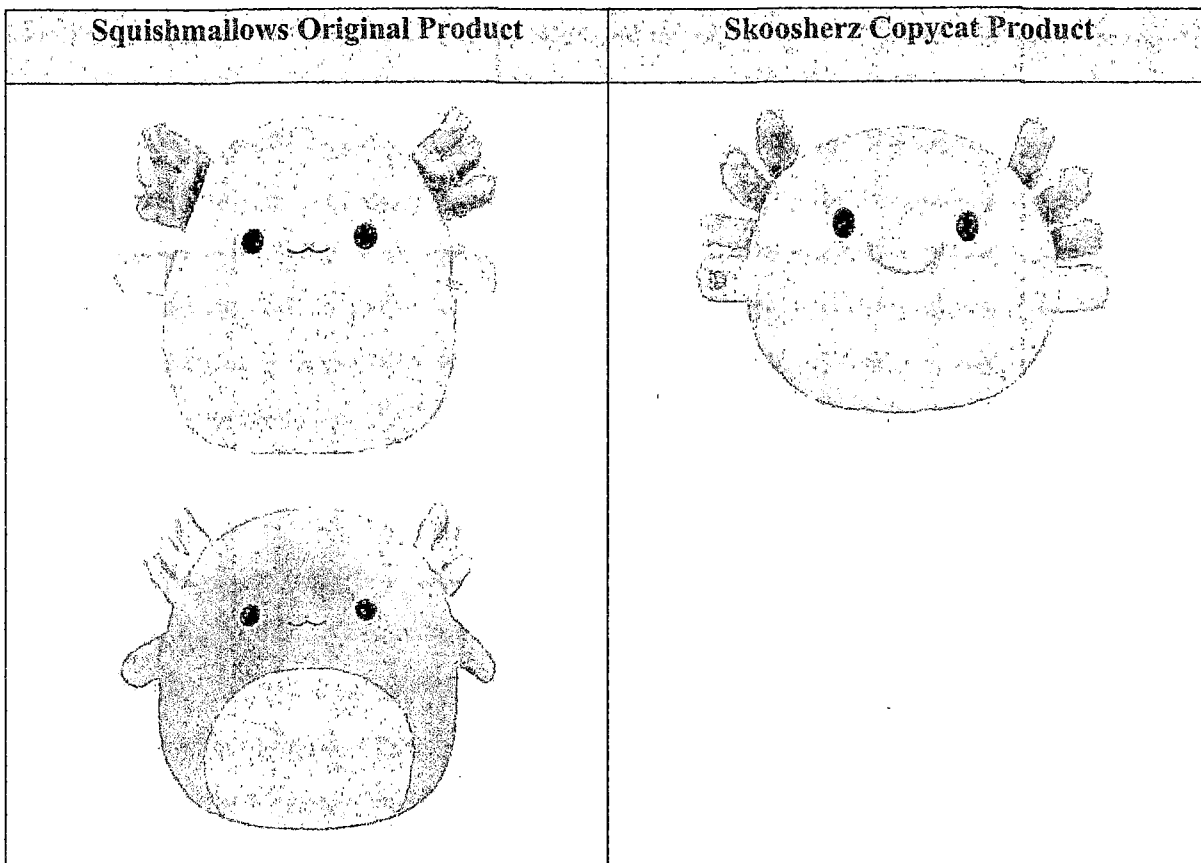
39. On January 11, 2024, Build-A-Bear launched Skoosherz, a line of already complete (stuffed, stitched, etc.) plush toys that copies and imitates Squishmallows. The Skoosherz products are a radical departure from Build-A-Bear's typical products. Indeed, Skoosherz lack all the customizable aspects that Build-A-Bear is known for. Consumers cannot go into a Build-A-Bear Workshop and build their own Skoosherz. Instead, Skoosherz are pre-made and available for purchase in the same way any traditional manufacturer would sell a toy—and the same way Squishmallows are sold.

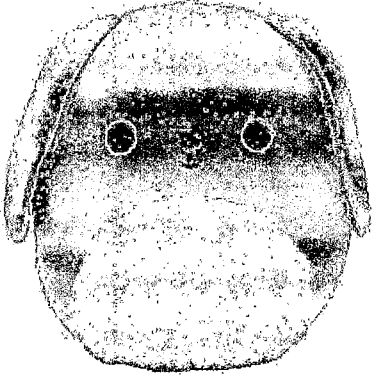
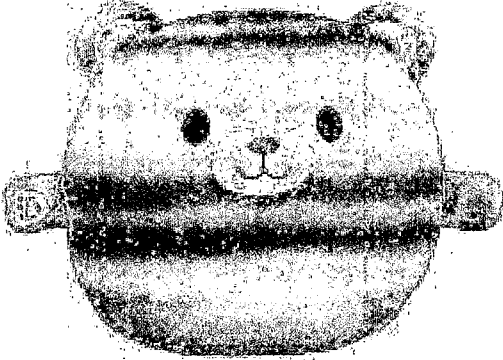
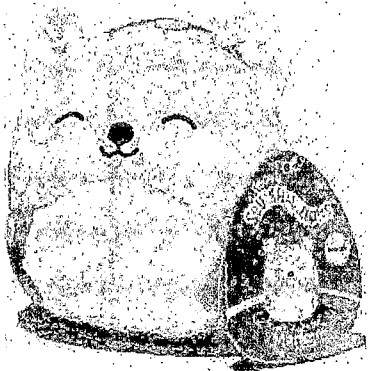
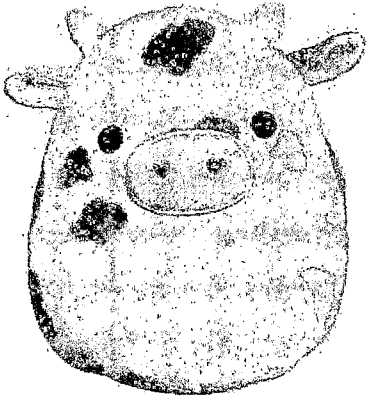
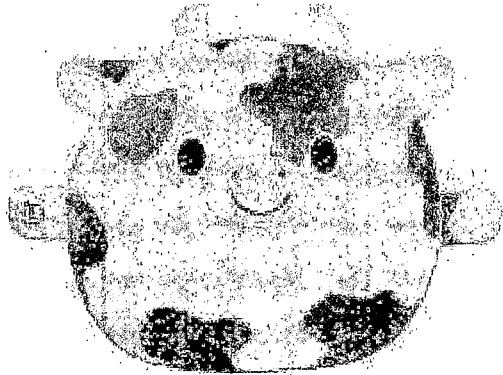
40. In other words, instead of maintaining its original business practice of allowing consumers to create their own toys, Build-A-Bear now seeks to trade off the goodwill of Squishmallows by marketing obvious copycat products—plush toys that look almost identical to popular Squishmallows. To be clear, Build-A-Bear is not licensed or otherwise authorized by Kelly Toys to market or distribute products embodying the Squishmallows Trade Dress.

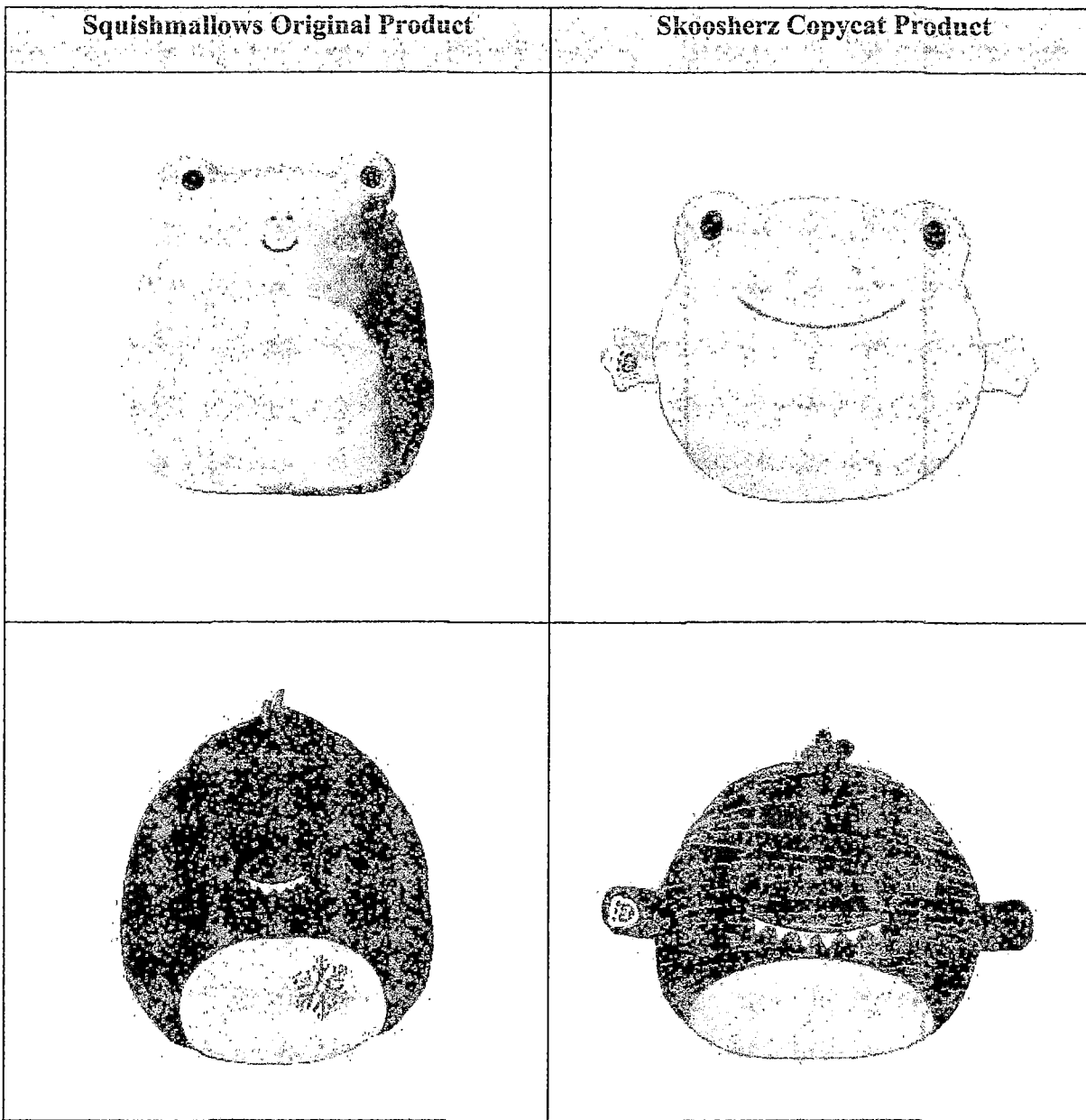
41. Skoosherz toys have the *same* distinctive trade dress as the popular Squishmallows, including: shaped fanciful renditions of animals/characters; simplified Asian style Kawaii faces; embroidered facial features; distinctive and non-monochrome coloring; and short-pile exterior.

42. Build-A-Bear does not just copy the shape, material and general characteristics of Squishmallows, Build-A-Bear went design by design and made an almost exact replica of each Squishmallows design; Squishmallows has a rainbow bear, Build-A-Bear made a rainbow Skoosherz; Squishmallows has a green frog, Build-A-Bear made a green frog Skoosherz; Squishmallows has a pink cow, Build-A-Bear made a pink cow Skoosherz. This list goes on and is not complete.

43. Dinosaurs, axolotls, and soon vegetables—Build-A-Bear made sure that each of its original five Skoosherz was an exact copy of a popular Squishmallows character. This includes the beloved and extremely unique Squishmallows axolotl, which Build-A-Bear ensured to copy with precision. Side by side comparisons of Squishmallows and just a few of the copycat Skoosherz products plainly show how striking the similarities are:



Squishmallows Original Product	Skoosherz Copycat Product
	
	
	



44. Build-A-Bear is already working on creating additional infringing Skoosherz characters, including characters that copy the widely-popular fruit and vegetable Squishmallows.

45. Even worse, Build-A-Bear not only parroted Squishmallows, but it also tricked Squishmallows' manufacturer into creating the infringing Skoosherz copycat products. Specifically, Build-A-Bear reached out to the Squishmallows manufacturer (with whom Kelly Toys has an airtight confidentiality contract "Manufacturer Contract") and asked the manufacturer [2532761/4]

to create a Squishmallows look-alike. A true and correct copy of Pursuant to the Manufacturer Contract is attached hereto as **Exhibit 1**.

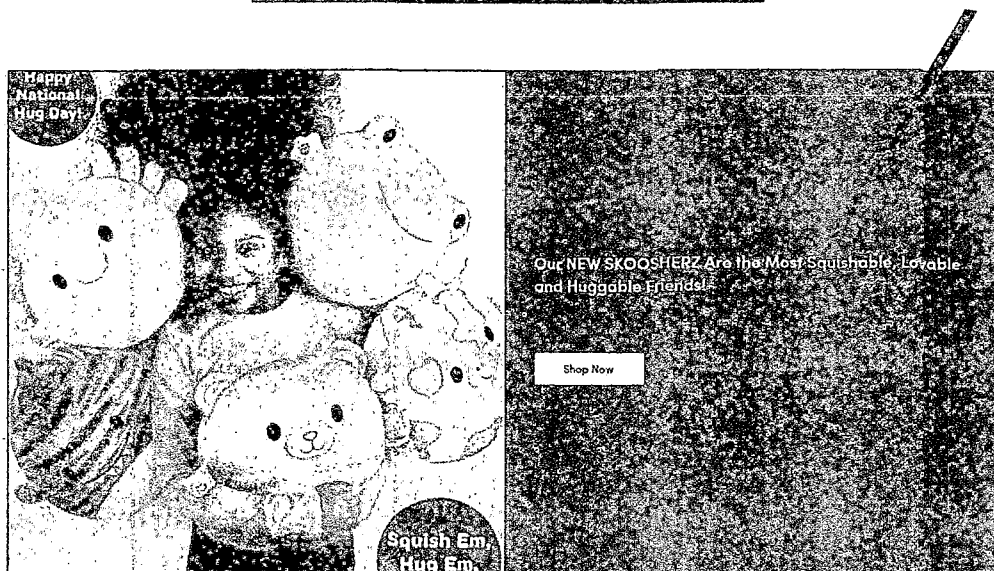
46. Plaintiffs are informed and believe that when the manufacturer expressed concerns that the Skoosherz sought to be manufactured were Squishmallows copycats, Build-A-Bear first incorrectly represented that such copycat products were permitted because the products were sold in the public domain, and then sent another correspondence directing the manufacturer and produce the violative goods.

47. There can only be one explanation for Build-A-Bear's insistence on both using the same manufacturer as Squishmallows and proceeding with its copycat product despite the manufacturer's warning: Build-A-Bear intended on misappropriating the Squishmallows Trade Dress and hoped to leverage Squishmallows' confidential information in the manufacturer's possession.

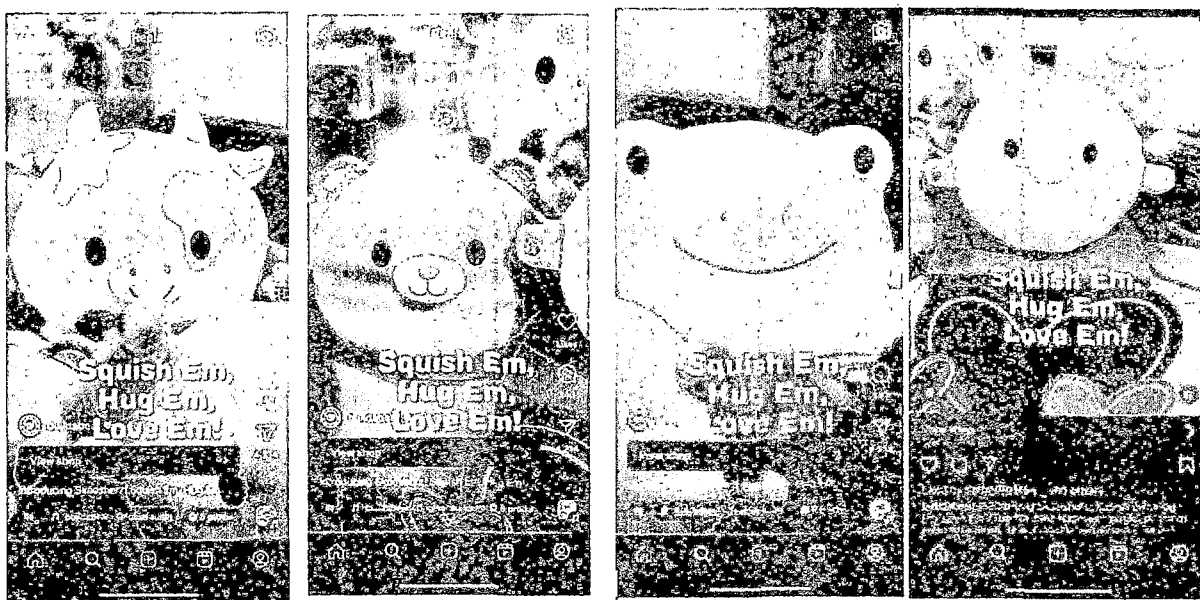
E. Build-A-Bear's Actions Have Caused Great Consumer Confusion

48. Not only has Build-A-Bear created Skoosherz to visually and tactilely mirror Squishmallows, but Build-A-Bear has also tried to trick customers looking for Squishmallows into buying Skoosherz instead. By naming its products that so closely resemble Squishmallows Skoosherz, Build-A-Bear has taken steps to ensure that customers seeking out Squishmallows (often referred to as "Squish") become mistaken by the confusingly similarly named Skoosherz instead.

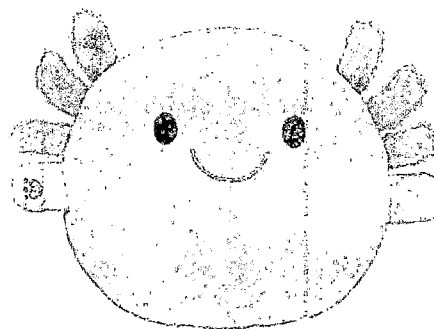
49. Build-A-Bear has sought to market off of this confusion by portraying its Skoosherz as the "most squishable," and advertising that consumers can "Squish Em," plainly seeking to create an association between the infringing Skoosherz and the wildly popular Squishmallows, or "Squish:"



[2532761/4]



50. Build-A-Bear's descriptions of individual Skoosherz toys similarly seek to associate with Squishmallows, noting that they are "squishable." For example, the product details for Build-A-Bear's axolotl (a copy of the unique animal that is one of Squishmallows' most popular characters) state:

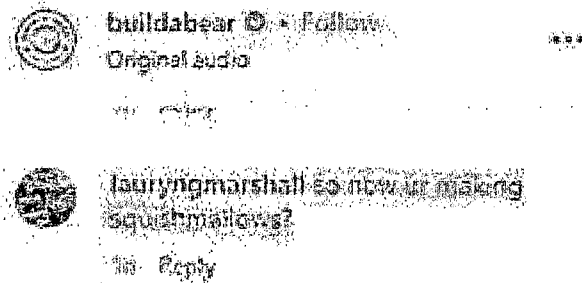


Product Details Specifications Gift Options Store Availability

Skoosherz are our most squishable, lovable and huggable friends! Our fan favorite pink axolotl gets the Skoosherz treatment with this adorable plush. The large, round plush has the axolotl's signature smiley face with fuzzy pink gills on its side. Make a splash with this ultra huggable axolotl friend!

51. Skoosherz products create a likelihood of confusion with original Squishmallows products. In fact, there is evidence of *actual* consumer confusion. For example, on a recent promotional Skoosherz Instagram post, a user asked whether Build-A-Bear was now making Squishmallows:

[2532761/4]



52. Other consumers have also noted how similar Skoosherz are to Squishmallows. Indeed, the official Build-A-Bear Instagram account was forced to clarify that these were indeed Skoosherz, not Squishmallows, when a commentor posted “SQUISHMALLOW!?!?” to Build-A-Bear’s promotional video of Skoosherz.

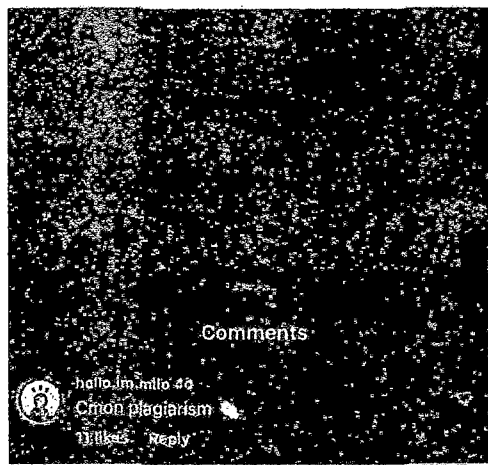
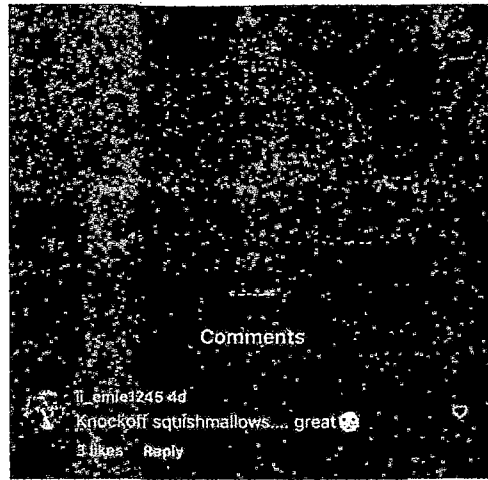


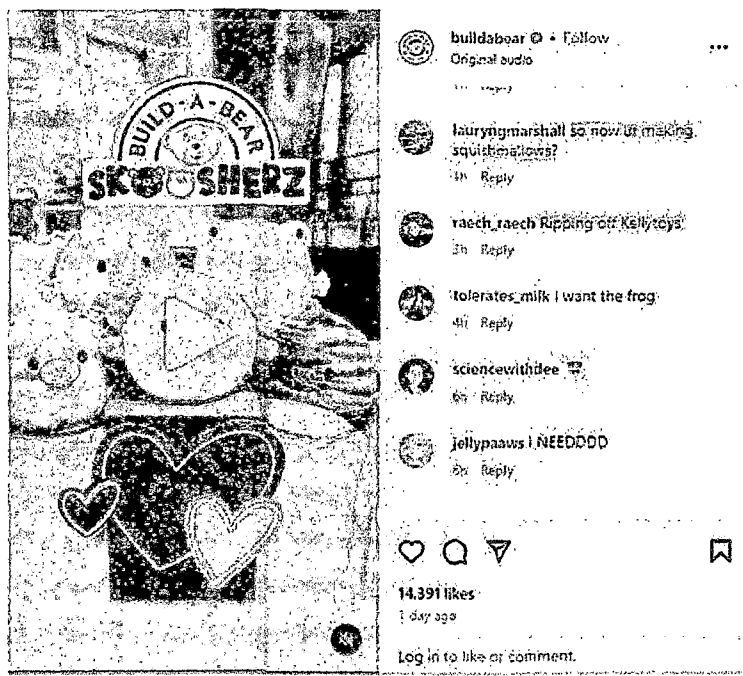
53. This post is not only conclusive evidence of consumer confusion, but it is also evidence of Squishmallows’ above-described secondary meaning. When consumers saw Skoosherz characteristics, they did not refer to them as a build a bear, plush toy, or pink cow, they referred to them as “Squishmallow.”

[2532761/4]

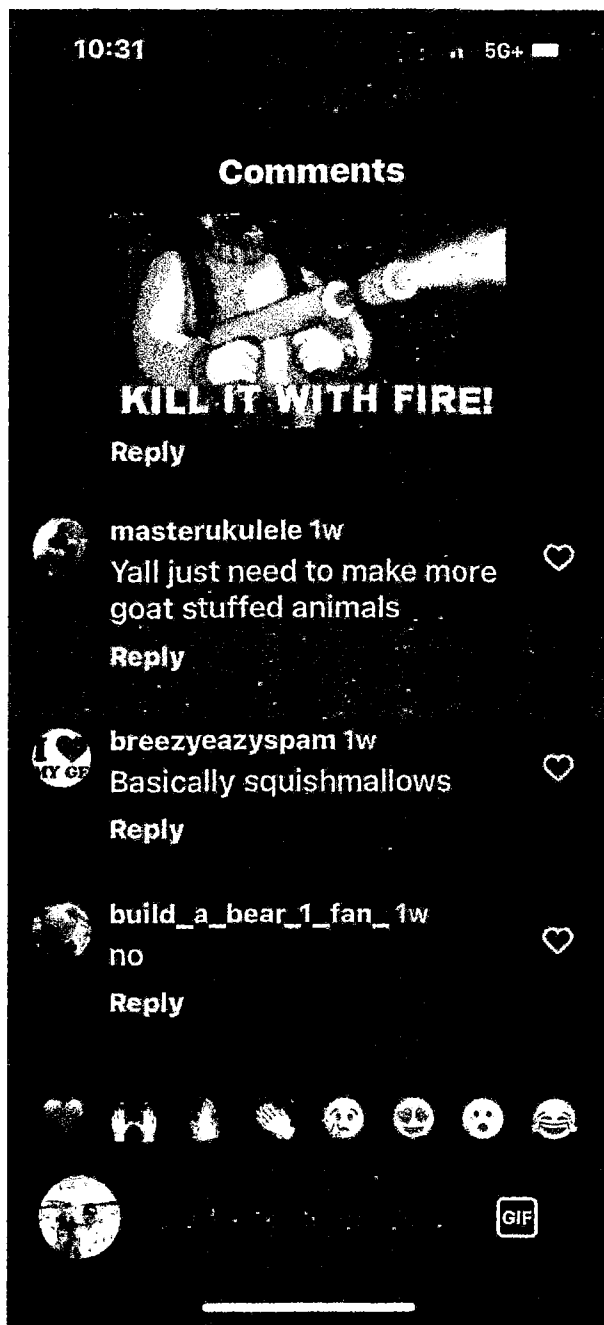
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54. These users were not alone. Build-A-Bear's Instagram post announcing its new Skoosherz line is riddled with posts calling them "knockoff Squishmallows" and noting the obvious similarities between these new products and the well-known Squishmallows:

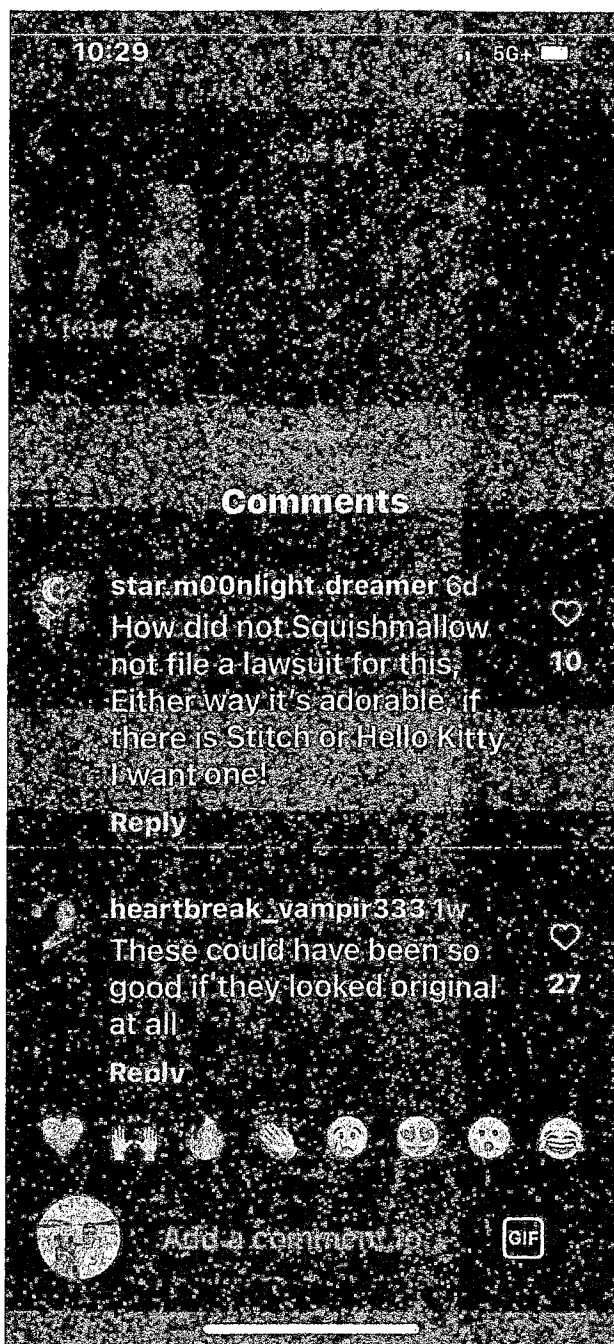














55. Other consumers noted that Skoosherz are “like a worse Squishmallow,” even noting that Skoosherz chose to copy several of the most popular Squishmallows characters. Still

[2532761/4]


27

others highlight the fact that Skoosherz represent a radical departure from Build-A-Bear's traditional model of building a custom toy, referring to them as "soulless ripoff[s]":

 fairviniaa • 10 hr. ago
I'm sorry but I really can't see the appeal 😞 like I collect both squishmallows and bab but these designs are just lazy and look like cheap squishmallow knockoffs (they literally used the most popular squishmallow animals/designs) and like I don't understand why they'd make these (besides wanting an easy cash grab) they have none of the features that make babs special and unique, they didn't even make clothes for them and they're overpriced too (and imb they're not even cute 😞) I mean if you enjoy them I'm happy for you I don't wanna ruin the fun but its just a no from me

 stabby_coffin_salt • 2 days ago
It's like a worse Squishmallow. I'd rather just get one of those Squishern's or whatever they're called (they have one that's a plague doctor).
These knockoffs remind me of those TY squish things. Can't stand the lack of quality or thought.
The cow is kinda cute I guess?

👍 177 🗑️ Reply 📤 Share ...

 saredarebear • 4 hr. ago
I feel like if they were going to make something resembling squishmallows they could at least make it so you "build" it and make a line of clothing for it so it does not feel like such a soulless ripoff. It's cute, but Build a Bear has something that is pretty unique and I do not understand why these were released the way they were.

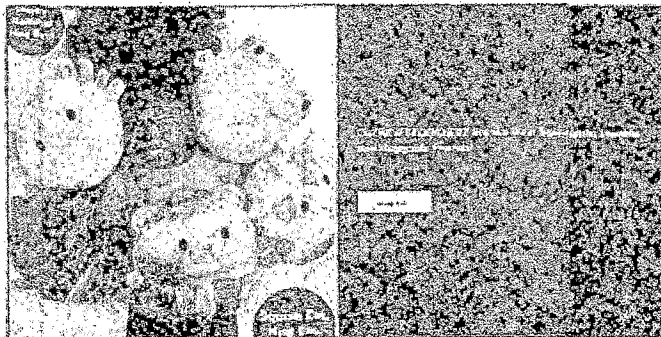
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56. Even Build-A-Bear's photos and ad campaigns directly mirror Squishmallows:

Squishmallows



Skoosherz



57. Defendant Build-A-Bear has never had common law trade dress rights to the Squishmallows Trade Dress.

[2532761/4]

28

58. Build-A-Bear's actions have caused and will continue to cause significant harm to Kelly Toys. As a result of consumer confusion, Kelly Toys has lost and will continue to lose potential customers, sales, and market share.

59. In sum, Build-A-Bear's willful conduct has damaged and will continue to irreparably damage the reputation, business, and goodwill of Kelly Toys. And, as can be seen from Build-A-Bear's plans to release additional infringing Skoosherz, unless enjoined, Build-A-Bear will continue to further escalate their infringing activities.

60. All conditions precedent to the filing of this Action have been performed, have occurred, have been excused, and/or have been waived or otherwise satisfied.

61. Plaintiffs have retained the undersigned counsel to prosecute this action and is obligated to pay them attorneys' fees for their services in bringing this action and costs associated with the same.

COUNT I
COMMON LAW TRADE DRESS INFRINGEMENT

62. Plaintiffs reaffirm and reallege paragraphs 1 through 61 as if fully stated herein.

63. Kelly Toys owns the Squishmallows Trade Dress.

64. Beginning in 2016 and continuing without interruption, Kelly Toys and its predecessor have expended a great deal of time, effort, and money in the promotion of its Squishmallows line. In fact, because of Kelly Toys' extensive promotional activities and widespread display of plush toys embodying the Squishmallows Trade Dress directed to the public, and as a consequence of Kelly Toys' well-earned reputation for fairness and integrity in dealings with its customers, the relevant consuming public has come to recognize and associate plush toys embodying the trade dress as high-quality goods connected with or offered by Kelly Toys.

65. Simply stated, the Squishmallows Trade Dress has a secondary meaning that, when viewed as a whole, presents a non-functional look that is uniquely associated with Squishmallows and Kelly Toys.

66. At no time has Kelly Toys transferred any rights in the Squishmallows Trade Dress, name, brand, likeness, or otherwise to Defendant Build-A-Bear.

67. Notwithstanding the foregoing, on January 11, 2024, Build-A-Bear launched “Skoosherz,” a line of plush toys that copies and imitates Squishmallows. Skoosherz toys have the *same* distinctive trade dress as the popular Squishmallows, including: shaped fanciful renditions of animals/characters; simplified Asian style Kawaii faces; embroidered facial features; distinctive and non-monochrome coloring; and short-pile exterior. Simply stated, the design of Squishmallows and Skoosherz are confusingly similar.

68. Through “Skoosherz,” Defendant purports to be associated with the Squishmallows. It is not.

69. Moreover, not only do Skoosherz visually and tactilely simulate Squishmallows, but Build-A-Bear has also tried to trick customers looking for Squishmallows into buying Skoosherz instead. By naming its products that so closely resemble Squishmallows “Skoosherz,” Build-A-Bear has taken steps to ensure that customers seeking out Squishmallows (often referred to as “Squish”) become mistaken by the confusingly similarly named Skoosherz instead. Importantly, there is evidence of *actual* customer confusion.

70. Defendant Build-A-Bear’s continued marketing and distribution of “Skoosherz” that so closely resemble Squishmallows has and will continue to cause a likelihood of confusion, mistake, and deception in the marketplace and among customers, causing irreparable harm to Plaintiffs and in violation of Plaintiffs’ common law trade dress rights.

71. As a result of Defendant's infringement, Plaintiffs have been damaged by the resulting confusion.

WHEREFORE, Plaintiffs respectfully request that this Court enter judgment in their favor against Defendant for damages, prejudgment, and post-judgment interest and award other and further relief as this Court deems just and proper.

COUNT II
COMMON LAW UNFAIR COMPETITION

72. Plaintiffs reaffirm and reallege paragraphs 1 through 61 as if fully set forth herein.

73. Defendant's infringing products incorporate matter constituting reproductions, copies, and/or colorable imitations of Kelly Toys' Squishmallows Trade Dress. Defendant's unauthorized use of Kelly Toys' Squishmallows Trade Dress constitutes unfair competition and is likely to cause confusion and mistake in the minds of the trade and the purchasing public as to the source of Defendant's products and to cause purchasers to believe that Defendant's products are authentic products of Kelly Toys when in fact, they are not.

74. Defendant has intentionally appropriated Kelly Toys' Squishmallows Trade Dress with the intent of causing confusion, mistake, and deception as to the source of its goods and with the intent of palming off Defendant's goods as those of Kelly Toys. Defendant has thus committed unfair competition under the common law of the State of Florida.

75. By its actions in infringing Kelly Toys' Squishmallows Trade Dress, Defendant is improperly trading upon the reputation and goodwill, and impairing valuable rights in, the Squishmallows Trade Dress.

76. Said activities of Defendant have caused irreparable harm and damage to the rights in the Squishmallows Trade Dress and to Kelly Toys' business reputation and goodwill.

77. As a result of Defendants' conduct, Plaintiffs have suffered damages.

WHEREFORE, Plaintiffs respectfully request that this Court enter judgment in their favor against Defendant for damages, prejudgment, and post-judgment interest and award other and further relief as this Court deems just and proper.

COUNT III
VIOLATION OF THE FLORIDA DECEPTIVE AND UNFAIR TRADE PRACTICES
ACT

Florida Statute § 501.021, *et seq.*

78. Plaintiffs reaffirm and reallege paragraphs 1 through 61 as if fully set forth herein.

79. This is an action for violation of the Florida Deceptive and Unfair Trade Practices Act, Florida Statute Section 501.201, *et seq.* (“FDUTPA”).

80. A primary purpose of FDUTPA is “[t]o protect the consuming public and *legitimate business enterprises* from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce.” § 501.202(2), Fla. Stat. (emphasis added).

81. Plaintiffs have standing to sue under FDUTPA because they are legitimate business enterprises that were directly harmed by Defendant’s unfair business practices.

82. Kelly Toys Holdings, LLC is the exclusive owner of all right, title, and interest in and to the Squishmallows Trade Dress. Beginning in 2016 and continuing without interruption, Kelly Toys and its predecessor have expended a great deal of time, effort, and money in the promotion of its Squishmallows line. In fact, because of Kelly Toys’ extensive promotional activities and widespread display of plush toys embodying the Squishmallows Trade Dress directed to the public, and as a consequence of Kelly Toys’ well-earned reputation for fairness and integrity in dealings with its customers, the relevant consuming public has come to recognize and associate plush toys embodying the Squishmallows Trade Dress as high-quality goods connected with or offered by Kelly Toys.

83. At no time has Kelly Toys transferred any rights in the Squishmallows Trade Dress, name, brand, likeness, or otherwise to Defendant Build-A-Bear.

84. Notwithstanding the foregoing, on January 11, 2024, Build-A-Bear launched “Skoosherz,” a line of plush toys that copies and imitates Squishmallows. Skoosherz toys have the *same* distinctive trade dress as the popular Squishmallows, including: shaped fanciful renditions of animals/characters; simplified Asian style Kawaii faces; embroidered facial features; distinctive and non-monochrome coloring; and short-pile exterior.

85. Through “Skoosherz,” Defendant purports to be associated with the Squishmallows. It is not.

86. Moreover, not only do Skoosherz visually and tactilely simulate Squishmallows, but Build-A-Bear has also tried to trick customers looking for Squishmallows into buying Skoosherz instead. By naming its products that so closely resemble Squishmallows “Skoosherz,” Build-A-Bear has taken steps to ensure that customers seeking out Squishmallows (often referred to as “Squish”) become mistaken by the confusingly similarly named Skoosherz instead. Importantly, there is evidence of *actual* customer confusion.

87. Even further, Build-A-Bear infringed on the Squishmallows Trade Dress when Build-A-Bear tricked Squishmallows’ manufacturer into making Skoosherz. Build-A-Bear knew or had reason to know that the Squishmallows Trade Dress was improperly obtained and copied. In fact, the Squishmallows manufacturer told Build-A-Bear that its designs too closely resembled Squishmallows. Nonetheless, Build-A-Bear used the same manufacturer in an attempt to benefit from the goodwill and brand recognition associated with Squishmallows.

88. Defendant's actions as indicated herein were and are willful and constitute an unfair method of competition, an unconscionable act or practice, and/or an unfair or deceptive act or practice in violation of § 501.204, Fla. Stat.

89. Further, Defendant's actions are likely to mislead (and have actually mislead) the consumer acting reasonably in the circumstances, to the consumer's detriment.

90. Defendant's actions have directly caused actual damage to the Squishmallows brand and Plaintiffs individually.

WHEREFORE, Plaintiffs respectfully request that this Court enter judgment in their favor against Defendant, award Plaintiffs attorneys fees and costs pursuant to § 501.2105, Fla. Stat., award injunctive relief pursuant to § 501.222(1), Fla. Stat., and award other and further relief as this Court deems just and proper.

COUNT IV
PRELIMINARY INJUNCTION

91. Plaintiffs reaffirm and reallege paragraphs 1 through 61 as if fully set forth herein.

92. Kelly Toys Holdings, LLC is the exclusive owner of all right, title, and interest in and to the Squishmallows Trade Dress. Beginning in 2016 and continuing without interruption, Kelly Toys and its predecessor have expended a great deal of time, effort, and money in the promotion of its Squishmallows line. In fact, because of Kelly Toys' extensive promotional activities and widespread display of plush toys embodying the Squishmallows Trade Dress directed to the public, and as a consequence of Kelly Toys' well-earned reputation for fairness and integrity in dealings with its customers, the relevant consuming public has come to recognize and associate plush toys embodying the trade dress as high-quality goods connected with or offered by Kelly Toys.

93. At no time has Kelly Toys transferred any rights in the Squishmallows Trade Dress, name, brand, likeness, or otherwise to Defendant Build-A-Bear.

94. Notwithstanding the foregoing, on January 11, 2024, Build-A-Bear launched “Skoosherz,” a line of plush toys that copies and imitates Squishmallows. Skoosherz toys have the *same* distinctive trade dress as the popular Squishmallows, including: shaped fanciful renditions of animals/characters; simplified Asian style Kawaii faces; embroidered facial features; distinctive and non-monochrome coloring; and short-pile exterior.

95. Through “Skoosherz,” Defendant purports to be associated with the Squishmallows. It is not.

96. Moreover, not only do Skoosherz visually and tactilely simulate Squishmallows, but Build-A-Bear has also tried to trick customers looking for Squishmallows into buying Skoosherz instead. By naming its products that so closely resemble Squishmallows “Skoosherz,” Build-A-Bear has taken steps to ensure that customers seeking out Squishmallows (often referred to as “Squish”) become mistaken by the confusingly similarly named Skoosherz instead. Importantly, there is evidence of *actual* customer confusion.

97. Defendant’s actions have caused direct damage to the Squishmallows brand and Plaintiffs individually. Defendant’s actions must be stopped.

98. Plaintiffs have no adequate remedy at law. If Defendant is permitted to continue to misappropriate the Squishmallows Trade Dress, Plaintiffs’ damages based on Defendant’s misrepresentations will only continue to increase.

99. Monetary damages alone will not correct or remedy the damages caused by Defendant.

100. Plaintiffs have a substantial likelihood of success on the merits.

101. Plaintiffs have a clear legal right to the relief sought.

102. Absent injunctive relief, Defendant will continue to improperly use the Squishmallows Trade Dress, and Plaintiffs will continue to suffer irreparable harm.

103. If Defendant is allowed to continue to improperly use the Squishmallows Trade Dress, the injury to Plaintiffs would outweigh any alleged harm an injunction may cause Defendant.

104. An injunction will serve the public interest as Defendant is creating confusion in the market and misleading consumers into believing “Skoosherz” are associated with Squishmallows. They are not.

WHEREFORE, Plaintiffs respectfully request that this Court enter a preliminary injunction, requiring that Defendant:

1. Immediately cease manufacturing, distributing, advertising, offering to sell or selling its infringing products or any colorable imitations of the Squishmallows Trade Dress, including, but not limited to, any Skoosherz products;
2. Immediately cease using the Squishmallows Trade Dress or any confusingly similar trade dress in connection with plush or other toys including, but not limited to, any Skoosherz products;
3. Immediately cease using the Squishmallows Trade Dress, or any confusingly similar trade dress, in connection with the advertisement, offer to sell, or sale of any toy products including, but not limited to, any Skoosherz products;
4. Immediately cease using imitations of the Squishmallows Trade Dress in connection with plush toys or other goods including, but not limited to, any Skoosherz products;

5. Immediately cease infringing or contributing to infringement of Kelly Toys Holdings, LLC's trade dress, or otherwise engaging in unfair competition with Kelly Toys in any manner or engaging in any conduct tending to falsely represent or likely to confuse, mislead, or deceive suppliers, purchasers, or any member of the public into thinking that Defendant or any of their products are affiliated with Kelly Toys or that Kelly Toys has otherwise sponsored, approved, or licensed any products or services of Defendant including, but not limited to, any Skoosherz products;
6. Immediately cease engaging in any other activity constituting unfair competition with Kelly Toys, or constituting infringement of the Squishmallows Trade Dress including, but not limited to, the sale of any Skoosherz products; and
7. Immediately cease assisting, aiding, or abetting any other person or business entity in engaging or performing any of the activities referred to in subparagraphs (1) through (6) above, or effecting any assignments or transfers, forming new entities or associations, or utilizing any other device for the purpose of circumventing or otherwise avoiding the prohibitions set forth in subparagraphs (1) through (6) above;
8. Be directed to file with the Court and serve on Kelly Toys, within thirty (30) days after entry of a final injunction, a report in writing under oath setting forth in detail the manner and form in which Defendant has complied with the injunction;
9. Preserve any and all communications with the manufacturer of Skoosherz, including but not limited to, communications with the Squishmallows' Chinese manufacturer;
10. Preserve any and all internal communications as well as communications with franchisees, affiliates, and subsidiaries about Skoosherz, their creation, manufacturing, sale, design, origin, name, and future; and

11. And any further relief this Court deems just and proper.

COUNT V
PERMANENT INJUNCTION

105. Plaintiffs reaffirm and reallege paragraphs 1 through 61 as if fully set forth herein.

106. Kelly Toys Holdings, LLC is the exclusive owner of all right, title, and interest in and to the Squishmallows Trade Dress. Beginning in 2016 and continuing without interruption, Kelly Toys and its predecessor have expended a great deal of time, effort, and money in the promotion of its Squishmallows line. In fact, because of Kelly Toys' extensive promotional activities and widespread display of plush toys embodying the Squishmallows Trade Dress directed to the public, and as a consequence of Kelly Toys' well-earned reputation for fairness and integrity in dealings with its customers, the relevant consuming public has come to recognize and associate plush toys embodying the trade dress as high-quality goods connected with or offered by Kelly Toys.

107. At no time has Kelly Toys transferred any rights in the Squishmallows Trade Dress, name, brand, likeness, or otherwise to Defendant Build-A-Bear.

108. Notwithstanding the foregoing, on January 11, 2024, Build-A-Bear launched "Skoosherz," a line of plush toys that copies and imitates Squishmallows. Skoosherz toys have the *same* distinctive trade dress as the popular Squishmallows, including: shaped fanciful renditions of animals/characters; simplified Asian style Kawaii faces; embroidered facial features; distinctive and non-monochrome coloring; and short-pile exterior.

109. Through "Skoosherz," Defendant purports to be associated with the Squishmallows. It is not.

110. Moreover, not only do Skoosherz visually and tactilely simulate Squishmallows, but Build-A-Bear has also tried to trick customers looking for Squishmallows into buying

Skoosherz instead. By naming its products that so closely resemble Squishmallows “Skoosherz,” Build-A-Bear has taken steps to ensure that customers seeking out Squishmallows (often referred to as “Squish”) become mistaken by the confusingly similarly named Skoosherz instead. Importantly, there is evidence of *actual* customer confusion.

111. Defendant’s actions have caused direct damage to the Squishmallows brand and to Plaintiffs individually. Defendant’s actions must be stopped.

112. Plaintiffs have no adequate remedy at law. If Defendant is permitted to continue to misappropriate the Squishmallows Trade Dress, Plaintiffs’ damages based on Defendant’s misrepresentations will only continue to increase.

113. Monetary damages alone will not correct or remedy the damages caused by Defendant.

114. Plaintiffs have a substantial likelihood of success on the merits.

115. Plaintiffs have a clear legal right to the relief sought.

116. Absent injunctive relief, Defendant will continue to improperly use the Squishmallows Trade Dress, and Plaintiffs will continue to suffer irreparable harm.

117. An injunction will serve the public interest as Defendant is creating confusion in the market and misleading consumers into believing “Skoosherz” are associated with Squishmallows. They are not.

WHEREFORE, Plaintiffs respectfully request that this Court enter a permanent injunction, requiring that Defendant:

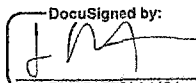
1. Immediately cease manufacturing, distributing, advertising, offering to sell or selling its infringing products or any colorable imitations of the Squishmallows Trade Dress, including, but not limited to, any Skoosherz products;

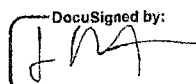
2. Immediately cease using the Squishmallows Trade Dress or any confusingly similar trade dress in connection with plush or other toys including, but not limited to, any Skoosherz products;
3. Immediately cease using the Squishmallows Trade Dress, or any confusingly similar trade dress, in connection with the advertisement, offer to sell, or sale of any toy products including, but not limited to, any Skoosherz products;
4. Immediately cease using imitations of the Squishmallows Trade Dress in connection with plush toys or other goods including, but not limited to, any Skoosherz products;
5. Immediately cease infringing or contributing to infringement of Kelly Toys Holdings, LLC's trade dress, or otherwise engaging in unfair competition with Kelly Toys in any manner or engaging in any conduct tending to falsely represent or likely to confuse, mislead, or deceive suppliers, purchasers, or any member of the public into thinking that Defendant or any of their products are affiliated with Kelly Toys or that Kelly Toys has otherwise sponsored, approved, or licensed any products or services of Defendant including, but not limited to, any Skoosherz products;
6. Immediately cease engaging in any other activity constituting unfair competition with Kelly Toys, or constituting infringement of the Squishmallows Trade Dress including, but not limited to, the sale of any Skoosherz products; and
7. Immediately cease assisting, aiding, or abetting any other person or business entity in engaging or performing any of the activities referred to in subparagraphs (1) through (6) above, or effecting any assignments or transfers, forming new entities or associations, or utilizing any other device for the purpose of circumventing or otherwise avoiding the prohibitions set forth in subparagraphs (1) through (6) above;

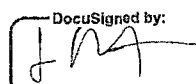
8. Be directed to file with the Court and serve on Kelly Toys, within thirty (30) days after entry of a final injunction, a report in writing under oath setting forth in detail the manner and form in which Defendant has complied with the injunction;
9. Preserve any and all communications with the manufacturer of Skoosherz, including but not limited to, communications with the Squishmallows' Chinese manufacturer;
10. Preserve any and all internal communications as well as communications with franchisees, affiliates, and subsidiaries about Skoosherz, their creation, manufacturing, sale, design, origin, name, and future; and
11. And any further relief this Court deems just and proper.

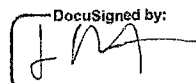
VERIFICATION

I declare under penalty of perjury that I have read the foregoing Verified Complaint, and the facts contained herein, are true and correct to the best of my knowledge.

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January 29, 2024 | 11:07 AM EST
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By: Jack Elum
Its: Authorized Representative

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Respectfully submitted this 29th day of January, 2024, by:

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EXHIBIT M

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7

8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA – WESTERN DIVISION
10

11 KELLYTOY WORLDWIDE, INC., a
California corporation,

12 Plaintiff,

13 vs.
14

HUGFUN, INTERNATIONAL, INC.
15 a/k/a Hugfun Int'l Inc., a Hong Kong
entity of unknown form, BJ'S
16 WHOLESALE CLUB, INC., a
Massachusetts corporation, and DOES 1
17 through 10, inclusive,

18 Defendants.
19

Case No. 19-cv-07652-MWF-MAA

**PLAINTIFF KELLYTOY
WORLDWIDE, INC.'S
OPPOSITION TO MOTION TO
DISMISS**

Date: November 4, 2019
Time: 10:00 a.m.
Place: Courtroom 5A
350 W. First Street
Los Angeles, CA 90012

Date Filed: September 6, 2019
Trial Date: None

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20	262 F.3d 101 (2nd. Cir. 2001)	23
21	Other Authorities	
22	Federal Rule of Civil Procedure 8(a)(2)	10
23	Federal Rule of Civil Procedure Rule 12(b)(6)	10
24	Federal Rule of Civil Procedure 15(a)(2)	24

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I.

INTRODUCTION

Defendant Hugfun International, Inc. (“Hugfun” or “Defendant”) moves to dismiss the complaint filed by Plaintiff Kellytoy Worldwide, Inc. (“Kellytoy”) on the grounds that Kellytoy’s trade dress and related claims fail to state a cause of action. But the Motion must be denied because it relies principally on unsupported factual assertions that have no place in a motion to dismiss, and expansive legal assertions that are almost uniformly overreaching. Beyond that, Defendant repeatedly mischaracterizes Kellytoy’s Squishmallow Trade Dress by improperly analyzing each of its individual elements in isolation, rather than assessing the totality of its elements as the law requires. The myriad fatal defects demand only one result – the Motion fails and must be denied.

This conclusion is more clear when these shortcomings are addressed more specifically. First, Defendant argues that the trade dress alleged in Kellytoy’s Complaint is comprised solely of functional elements common to plush toys. That issue, however, is one that courts have repeatedly held is a question of fact not appropriate for resolution on a motion to dismiss. Defendants tacitly acknowledging that fact, but nonetheless attempt to circumvent this legal proscription by characterizing its unsupported opinions as indisputable facts. It then proceeds to compound the problem by similarly misapplying the law governing the question of functionality, which requires that the Court view the trade dress as a whole – i.e., the visual representations viewed in conjunction with all of the various verbal descriptions – not as a catalogue of discrete elements. But when the appropriate legal standard is applied and the Squishmallow Trade Dress is viewed “as a whole,” it cannot reasonably be characterized as functional.

Second, Defendant argues that Kellytoy fails to plead the precise elements of its trade dress and then attempts to *prove* that Kellytoy cannot do so. This argument ignores the fact that Kellytoy’s description explains in great detail the elements of

1 the Squishmallow Trade Dress, both verbally and graphically – detail that
2 sufficiently articulates the design elements that compose the trade dress. And
3 contrary to Defendant’s suggestion, the cases cited by Defendant do not indicate
4 otherwise. Whether a product of genuine intellectual befuddlement or deliberate
5 distraction, Defendant is confusing a lack of adequate description with the breadth
6 of description. That confusion is critical here, because the latter issue is one better
7 considered a question of genericness rather than specificity, something that likewise
8 is a question of fact that cannot be addressed or resolved on a motion to dismiss.

9 Accordingly, and based on the arguments set forth in greater detail below,
10 Defendant’s motion to dismiss should be denied in its entirety.

11 II.

12 FACTUAL BACKGROUND

13 A. KELLYTOY DEVELOPS THE SQUISHMALLOW PLUSH TOYS

14 Kellytoy creates, manufactures, distributes and sells unique plush toys.
15 (Complaint ¶ 17.) In 2016, Kellytoy conceived and began creating its
16 Squishmallows line of plush toy designs, ultimately marketed in connection with the
17 SQUISHMALLOW trademark (collectively, “Squishmallows”). (*Id.* ¶ 20.) From
18 2016 to the present, Kellytoy expended large sums of money to develop, advertise,
19 and promote these product designs throughout the United States. (*Id.* ¶ 21.)
20 Kellytoy spends in excess of \$1,000,000 annually in direct to consumer and
21 business-to-business advertising in connection with its Squishmallows. (*Id.*)

22 Kellytoy sells a wide range of Squishmallows that feature the brand’s iconic
23 trade dress. (Complaint ¶ 22.) This trade dress includes, without limitation:

- 24 (1) substantially egg/bell shaped plush toys
25 depicting various similarly shaped fanciful renditions of
26 animals/characters; (2) simplified Asian style Kawaii faces
27 with repeating and complementary rounded/oval shaped
28 graphics depicting features on the characters themselves

1 (such as eyes, snouts and bellies) and which conform to
2 and support the overall egg/bell shape of the toys; (3)
3 embroidered facial features, such as eyes, nostrils, and/or
4 mouths; (4) distinctive contrasting and non-monochrome
5 coloring; and (5) short-pile velvety velour-like textured
6 exterior with a light and silky memory foam-like stuffing
7 providing an extremely soft and squeezable marshmallow
8 feel. These features, and the resulting overall look and
9 feel of the toys bearing them, are more fully depicted,
10 without limitation, in **Exhibit 1** hereto – features common
11 to Kellytoy’s line of Squishmallows (collectively together
12 with **Exhibit 1** the “Squishmallow Trade Dress”).

13 (*Id.*)

14 Beginning in 2016, Kellytoy expended a great deal of time, effort, and money
15 in the promotion of its Squishmallows. Due to Kellytoy’s unique design, extensive
16 marketing efforts, media coverage, and market penetration, the Squishmallow Trade
17 Dress acquired distinctiveness in the marketplace when applied to plush toys.
18 (Complaint ¶ 23.) The relevant consuming public has come to recognize and
19 associate plush toys bearing the Squishmallow Trade Dress as high quality goods
20 connected with or offered by a single source, Kellytoy. (*Id.*) The Squishmallow
21 Trade Dress has valuable goodwill and consumer recognition associated with it and
22 has come to symbolize the valuable goodwill and reputation of Kellytoy. (*Id.*)

23 Squishmallows have been featured in numerous magazines, press articles,
24 reviews, and videos; have appeared in multiple holiday and other gift guides; have
25 been the subject of numerous industry awards and product recommendation lists;
26 and have tens of thousands of social media followers. (Complaint ¶¶ 27-38.) In
27 addition, hundreds of well-known YouTube influencers and vloggers have shared
28 and posted images and videos of themselves holding Squishmallow products, and

1 tens of thousands of consumers have done the same through numerous media
2 platforms, including, Facebook, Instagram, Pinterest and YouTube. (*Id.* ¶¶ 39-40.)

3 Squishmallows are listed among the leading global brands and toys such as
4 Hatchimals, Hasbro, RB, Hot Wheels, NERF, and Spin Master by several industry
5 publications. (Complaint ¶ 41.) They are sold through hundreds of retailers
6 including Costco, Walmart, Walgreens, Kroger, Target, and Party City, among
7 others. (*Id.* ¶ 42.) Since the summer of 2017, alone, Kellytoy has sold
8 approximately 40 million (40,000,000) million Squishmallows with no indication
9 that sales will slow down anytime soon. (*Id.* ¶ 43.)

10 In fact, Kellytoy's Squishmallows branded toys have become so popular
11 among, sought after by, and recognizable as a brand by the public that some
12 members of the public have been selling unauthorized non-toy merchandise, such as
13 T-shirts and jewelry, bearing the images of some of Kellytoy's most popular
14 Squishmallows branded toys – a distinction typically reserved for famous brands
15 such as Disney and Looney Tunes. (Complaint ¶ 44.) In fact, because of the
16 immense popularity – no, ubiquity – of Kellytoy's Squishmallows line of plush toys,
17 Kellytoy has recently embarked on a global licensing initiative to license these
18 designs to include diverse categories of merchandise, including apparel, sleepwear,
19 accessories, headwear, home decor, health and beauty, back to school, stationery
20 and paper goods, games and puzzles, novelty, publishing and magazines, food and
21 beverage, and mobile gaming. (Complaint ¶ 45.)

22 **B. HUGFUN'S INFRINGING CONDUCT**

23 Sometime in 2019, and notably well after Kellytoy established its reputation
24 in its Squishmallow Trade Dress, Hugfun entered into an agreement with defendant
25 BJ's Wholesale Club, Inc. to have Hugfun supply BJ's with plush toys copying the
26 Squishmallow Trade Dress (the "Infringing Plush"). (Complaint ¶ 48.) Hugfun was
27 able to sell the Infringing Plush to BJ's at lower prices than those charged by
28 Kellytoy for the Squishmallows because, rather than investing in the creation and

1 development of its own designs and brand identity, Hugfun simply copied the
2 Squishmallow Trade Dress and produced a lower-quality (and thus cheaper)
3 product. (*Id.* ¶ 50.)

4 C. PROCEDURAL HISTORY

5 Kellytoy filed its complaint against Hugfun and BJ's on September 6, 2019.
6 (Docket No. 1.) Kellytoy alleges claims against Defendants for statutory and
7 common law trademark infringement, and statutory and common law unfair
8 competition. (Complaint ¶¶ 57-80.) Defendant Hugfun filed the motion to dismiss
9 opposed herein and defendant BJ's has failed to timely respond, resulting in the
10 Clerk of the Court entered default against it. (Docket Entry No. 17.)

11 **III.**

12 **DEFENDANTS' MOTION TO DISMISS SHOULD BE DENIED**

13 A. STANDARDS ON A MOTION TO DISMISS

14 The Federal Rules of Civil Procedure require that a complaint set forth “a
15 short and plain statement of the claim showing that the pleader is entitled to relief.”
16 Fed. R. Civ. P. 8(a)(2). This rule “contains ‘a powerful presumption against
17 rejecting pleadings for failure to state a claim.’” *Gilligan v. Jamco Dev. Corp.*, 108
18 F.3d 246, 249 (9th Cir. 1997) (quoting *Auster Oil & Gas, Inc. v. Stream*, 764 F.2d
19 381, 386 (5th Cir. 1985)). It is “axiomatic” that motions to dismiss are viewed with
20 disfavor and rarely granted. *Hall v. City of Santa Barbara*, 833 F.2d 1270, 1274
21 (9th Cir. 1986). Indeed, dismissal is proper only in “extraordinary” circumstances.
22 *U.S. v. Redwood City*, 640 F.2d 963, 966 (9th Cir. 1981).

23 In keeping with this policy, a court considering a motion to dismiss must view
24 the complaint in the light most favorable to the plaintiff. *Parks Sch. of Bus., Inc. v.*
25 *Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). The court must liberally construe
26 the complaint, accepting all material allegations as true and providing plaintiff with
27 all reasonable inferences to be drawn from those allegations. *Pareto v. FDIC*, 139
28 F.3d 696, 699 (9th Cir. 1998). Thus, a dismissal pursuant to Rule 12(b)(6) is

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1 “appropriate only where the complaint lacks a cognizable legal theory or sufficient
2 facts to support a cognizable legal theory.” *Mendiondo v. Centinela Hosp. Med.*
3 *Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008) (citing *Balistreri v. Pacifica Police Dep’t.*,
4 901 F.2d 696, 699 (9th Cir. 1990)).

5
6 B. KELLYTOY’S CLAIM FOR TRADE DRESS INFRINGEMENT IS
7 SUPPORTED BY THE ALLEGATIONS IN THE COMPLAINT

8 Trade dress refers to the “total image, design, and appearance of a product,”
9 including features such as its size, shape, color, color combinations, texture and
10 graphics. *Clicks Billiards, Inc. v. SixShooters, Inc.*, 251 F.3d 1252, 1257 (9th Cir.
11 2001) (citing *Int’l Jensen, Inc. v. Metrosound U.S.A., Inc.*, 4 F.3d 819, 822 (9th Cir.
12 1993)). In order to state a claim for trade dress infringement, the plaintiff must
13 plead that (1) its trade dress is nonfunctional; (2) its trade dress serves a source-
14 identifying role either because it is inherently distinctive or has acquired secondary
15 meaning; and (3) the defendant’s product creates a likelihood of consumer
16 confusion. *Millennium Labs. v. Ameritox, Ltd.*, 817 F.3d 1123, 1126 n.1 (9th Cir.
17 2016) (citing *Clicks Billiards, Inc.*, 251 F.3d at 1258; *One Indus., LLC v. Jim*
18 *O’Neal Distrib.*, 578 F.3d 1154, 1166 (9th Cir. 2009) (citation omitted).

19 Kellytoy alleges each of the elements above. In particular, Kellytoy alleges
20 that (1) its trade dress is nonfunctional (Complaint ¶¶ 22, 58, Ex. 1); (2) its trade
21 dress serves a source-identifying role because it is both inherently distinctive and
22 has acquired secondary meaning (*Id.* ¶¶ 21-46); and (3) the Defendants’ products at
23 issue create a likelihood of consumer confusion (*Id.* ¶ 48-52).

24 Nonetheless, Defendant argues that Kellytoy is required to plead *how* its trade
25 dress is non-functional and that, regardless, Kellytoy’s trade dress is demonstrably
26 functional as a matter of law. Defendant further argues that Kellytoy’s trade dress is
27 insufficiently pled. Defendant’s arguments are meritless.

1 **1. Kellytoy's Allegations as to Non-Functionality Are Sufficient**

2 The United States Supreme Court made it clear in *Ashcroft v. Iqbal* that in
3 order to survive a motion to dismiss, “a complaint must contain sufficient factual
4 matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”
5 *Ashcroft*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). Ignoring the
6 Supreme Court’s clear direction, Hugfun argues that Kellytoy must explain *how* its
7 trade dress is non-functional in its complaint, rather than simply including sufficient
8 factual matter which, if accepted as true, would render Kellytoy’s trade dress claim
9 plausible on its face. (Mot. 10:14-14:23.) There are multiple problems with this
10 approach.

11 First, Defendant’s argument is inexplicably premised solely on the
12 unpublished Central District decision in *Deckers Outdoor Corp. v. Fortune*
13 *Dynamic, Inc.*, No. CV 15-769 PSG (SSx), 2015 WL 12731929, at *3-4 (C.D. Cal.
14 May 8, 2015). (Mot. 10:15-20.) The requirement supposedly imposed by *Deckers*
15 *Outdoor Corp.* is not remotely settled law. The opinion itself relies solely on the
16 unpublished decisions of other out-of-state district courts. *Deckers Outdoor Corp.*,
17 2015 WL 12731929, at *3-4 (citing *Glassybaby, LLC v. Provide Gifts, Inc.*, No. C
18 11-380 MJP, 2011 WL 2218583 (W.D. Wash. Jun. 6, 2011); *DO Denim, LLC v.*
19 *Fried Denim, Inc.*, 634 F. Supp. 2d 403, 407-408 (S.D.N.Y. 2009).)

20 In addition, the “rule” announced in *Deckers Outdoor Corp.* has never been
21 adopted by the Ninth Circuit or the United States Supreme Court which, again,
22 require only that factual allegations support a claim that is plausible on its face. *See*,
23 *e.g.*, *Dehoog v. Anheuser-Busch InBev SA/NV*, 899 F.3d 758, 763 (9th Cir. 2018)
24 (*Iqbal* and *Twombly* are the standard); *Ashcroft*, 556 U.S. at 678; *Twombly*, 550 U.S.
25 at 570. Setting aside the impracticality of requiring a plaintiff to plead “how a trade
26 dress is non-functional”– essentially to prove a negative – at the pleading stage, it is
27 evident from the afore-cited case law that, the holding in *Deckers Outdoor Corp.* is
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1 simply an unjustified overstatement as to the pleading requirements imposed by
2 *Iqbal/Twombly*.

3 Third, Kellytoy *does* allege the facts necessary to state a claim for relief for
4 trade dress infringement that is plausible on its face (at the very least), including
5 whether the trade dress at issue is non-functional. (Complaint ¶ 22, 58-64, Ex. 1.)
6 The assessment of trade dress functionality is, in that regard, a two-step analysis
7 explained thoroughly below but which generally requires that a court determine
8 whether the trade dress is essential to the use or purpose of the article or affects its
9 cost or quality and, if not, whether protection of the trade dress as a trademark
10 would impose a “significant non-reputation-related competitive disadvantage.”
11 *Millennium Labs. v. Ameritox, Ltd.*, 817 F.3d 1123, 1128-29 (citing *Au-Tomotive*
12 *Gold, Inc. v. Volkswagen of Am., Inc.*, 457 F.3d 1062, 1072 n.8 (9th Cir. 2006)).

13 In this case, the Squishmallow Trade Dress thoroughly described in paragraph
14 22 and depicted in Exhibit 1 to the Complaint is not *essential* to the use or purpose
15 of a plush toy in general, nor affects its cost or quality -- at least not in the sense
16 intended by the relevant authority, given that this test is most often applied in cases
17 involving “utilitarian, physical devices.” *Millennium Labs.*, 817 F.3d at 1128-29
18 (report graphically charting whether patients are taking the pain medications as
19 prescribed and to assess whether the patients are taking any non-prescribed drugs);
20 *see also TrafFix Devices, Inc. v. Marketing Displays, Inc.*, 532 U.S. 23, 25-26
21 (2001) (trade dress claimed for temporary road signs with spring mechanisms). It is
22 equally true that the protection afforded to the Squishmallow Trade Dress would not
23 impose a significant non-reputation-related competitive disadvantage on other toy
24 makers, since there are obviously an infinite number of forms, features, and textures
25 in which to design a plush toy – the vast majority of which do not infringe upon
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1 Kellytoy's alleged Squishmallow Trade Dress.¹ Kellytoy's allegations in this regard
2 are sufficient.

3 **2. "Functionality" Is Not Properly Decided on a Motion to Dismiss**

4 At the outset, the issue of "functionality" of trade dress is not appropriately
5 determined at the pleading stage. Indeed, the Ninth Circuit has also made it clear
6 that the question as to whether trade dress is functional is "an *intensely* factual
7 issue." *Millennium Labs.*, 817 F.3d at 1129 (emphasis added); *see also Clicks*
8 *Billiards, Inc.*, 251 F.3d at 1258 (functionality is question fact). Indeed, even the
9 district court in *Deckers Outdoor Corp.* held that it was "a question of fact, not of
10 law, that is generally not suitable to disposition on a motion to dismiss." *Deckers*
11 *Outdoor Corp.*, No. CV 15-769 PSG (SSx), 2015 WL 12731929, at *5; *accord*
12 *Morton v. Rank Am., Inc.*, 812 F. Supp. 1062, 1069 (C.D. Cal. 1993) (holding that
13 question of functionality is a question of fact and cannot be decided as a matter of
14 law at the motion to dismiss stage); *accord Five Star Gourmet Foods, Inc. v. Ready*
15 *Pac Foods, Inc.*, CV 18-2436 DDP (KKx), 2019 WL 1260634 (C.D. Cal. 2019).
16 Therefore, based on this fact alone, the Court should deny Defendant's motion to
17 dismiss premised on the issue of "functionality."

18 **3. Kellytoy's Trade Dress Is Not Functional**

19 In addition to improperly raising the issue of functionality on a motion to
20 dismiss, Defendant's analysis utterly misapplies the functionality analysis, by
21 ignoring the fact that it is *the design as a whole* of an article that must be non-
22 functional for it to serve as a trademark – Defendant instead improperly
23 disaggregates the features of Kellytoy's claimed trade dress for the analysis,
24 divorcing each such feature from the overall visual impression of the products at
25 issue. (Mot. § 3.B.1-5, 12:1-14:5.) Again, the Ninth Circuit has expressly rejected
26 this piecemeal approach to trade dress analysis. *Clicks Billiards, Inc.*, 251 F.3d at

27 ¹ For example, traditional teddy bears – arguably one of the most ubiquitous plush toys –
28 do not fit within the Squishmallow Trade Dress.

1 1261; *see also Fuddruckers, Inc.*, 826 F.2d at 843, n. 7 (“We examine trade dress as
2 a whole to determine its functionality, [citation omitted]; functional elements that
3 are separately unprotectable can be protected together as part of a trade dress.”).

4 Indeed, the Ninth Circuit has explained that “[t]rade dress is the *totality* of
5 elements in which a product or service is packaged or presented.” *Stephen W.*
6 *Boney, Inc. v. Boney Servs., Inc.*, 127 F.3d 821, 828 (9th Cir. 1997) (emphasis
7 added) (quoting 1 McCarthy on Trademarks and Unfair Competition § 8:1 (4th ed.
8 1996)). This includes, as set forth above, features such as the product’s size, shape,
9 color, color combinations, texture or graphics. *Clicks Billiards, Inc.*, 251 F.3d at
10 1257.

11 Notwithstanding that, and contrary to Defendant’s suggestion that each
12 element of the trade dress at issue must be evaluated and analyzed separately and in
13 isolation from each other, courts are required to focus on the overall visual
14 impression of a product, rather than its individual elements, in evaluating whether
15 the trade dress at issue is functional. *Clicks Billiards, Inc.*, 251 F.3d at 1259. This
16 is because elements which might otherwise be considered functional may be
17 protected together as a product’s trade dress. *Fuddruckers, Inc. v. Doc’s B.R.*
18 *Others, Inc.*, 826 F.2d 837, 842 (9th Cir. 1987).

19 The Ninth Circuit applies a two-step test in order to determine whether a
20 particular trade dress is functional. First, the court must determine: (1) whether the
21 design yields a utilitarian advantage; (2) whether alternative designs are available;
22 (3) whether advertising touts the utilitarian advantages of the design; and (4)
23 whether the particular design results from a comparatively simple or inexpensive
24 method of manufacture. *Millennium Labs.*, 817 F.3d at 1128-30. Again, “[n]o one
25 factor is dispositive; all should be weighed collectively.” *Id.* at 1130 (citing *Disc*
26 *Golf Ass’n v. Champion Discs, Inc.*, 158 F.3d 1002, 1006 (9th Cir. 1998)).

27 If the court determines that the trade dress at issue is not functional, it
28 proceeds to the second step in order to determine “whether the protection of the

1 feature as a trademark would impose a significant non-reputation-related
2 competitive disadvantage.” *Id.* at 1128 (quoting *TrafFix Devices, Inc.*, 532 U.S. at
3 33). This analysis only applies, however, to “product features that serve an
4 aesthetic function wholly independent of any source identifying function.” *Id.* at
5 1130 (quoting *Au-Tomotive Gold, Inc. v. Volkswagen of Am., Inc.*, 457 F.3d 1062,
6 1073 (9th Cir. 2006). If the feature serves *any* source identifying function, the
7 determination as to whether protecting it would impose a significant non-reputation-
8 related competitive disadvantage is a question of fact.² *Id.* at 1131 (evidence that
9 graphical format served, in part, a source-identifying function was sufficient to
10 allow jury to assess question of aesthetic functionality).

11 This two-step analysis is best exemplified in *Millennium Laboratories*, itself –
12 predictably, a case wholly ignored by Defendant. The trade dress at issue was
13 Millennium’s design of a report (the “R.A.D.A.R.[®] Report”) associated with a test
14 for healthcare providers to use with chronic pain patients who have been prescribed
15 pain medications. *Id.* at 1125. Millennium described its trade dress as including,
16 among other things, a “graphical form” with a side-by-side presentation of a bell
17 curve on the left, a historical plot graph on the right, and a combination of bold and
18 dashed lines on the bell curve graph and a combination of numbers and letters on the
19 plot graph on the right. *Id.* at 1129.

20 The court held that genuine issues of material fact precluded summary
21 judgment as to whether the claimed trade dress had any utilitarian advantage since a
22 jury could conclude that elements of the design were purely aesthetic in nature, that
23 there were many alternatives to the design of the R.A.D.A.R.[®] Report, that
24 Millennium’s advertising did not focus on the utility of the layout of its report, and
25

26 ² Defendant makes no reference to this test or the limitations on the doctrine
27 of aesthetic functionality in their moving papers. Instead, Defendant wrongly
28 suggests that aesthetic features of products are *inherently* functional and thus
ineligible for trade dress protection. (Mot. 10:21-11:1-16; 12:1-14:23.)

1 that the design actually increased the cost of the product. *Id.* at 1130. The court
2 held that, since the design of the test results was “at least in part, crafted to
3 distinguish the R.A.D.A.R.[®] Report from its competitors, and not simply to attract
4 consumers,” the question of “aesthetic functionality” was best left to the jury. *Id.* at
5 1131.

6 The Squishmallow Trade Dress (as a whole) does not offer a utilitarian
7 advantage under step one of the *Millennium Laboratories* analysis since, as in
8 *Millennium*, a jury could conclude that many (if not all) elements of the design are
9 purely aesthetic in nature. (Complaint ¶ 22.) This is particularly obvious when the
10 specific features analyzed separately in Defendant’s motion are viewed in the
11 aggregate, as required. The shape, appearance, texture, and feel of the product are
12 all aesthetic features as to which there are innumerable alternatives and which,
13 indeed, were specifically designed to distinguish the Squishmallows from other toys.
14 (*Id.* ¶¶ 20-21.) Such a finding is all the more appropriate where, as here, the matters
15 being considered at the motion to dismiss stage, rather than on summary judgment.

16 The determination under step two of the test, viz., whether the protection of
17 the feature as a trademark would impose a significant non-reputation-related
18 competitive disadvantage, presents a question of fact as much as the rest of the
19 functionality analysis.³ *Mercado Latino, Inc. v. Indio Prods.*, No. CV 13-01027
20 DDP (RNBx), 2017 WL 1356315, at *3 (C.D. Cal. Apr. 11, 2017) (citing
21 *Fuddruckers, Inc.*, 826 F.2d at 842-43). Kellytoy would have no difficulty
22 amending the Complaint to supplement its allegations as they relate to either step in
23 the analysis but this remains a factual issue that is not appropriate for resolution on a
24 motion to dismiss. *Id.*; *Clicks Billiards, Inc.*, 251 F.3d at 1258; *Morton v. Rank Am.,*
25 *Inc.*, 812 F. Supp. at 1069.

26 ³ Kellytoy will have no trouble introducing evidence at summary judgment or trial as to the
27 myriad alternative designs for plush toys in the marketplace which embody one or more elements
28 of the Squishmallow Trade Dress without infringing on the trade dress as a whole, in contrast to
Hugfun’s accused infringing goods.

1 Indeed, even putting aside the numerous flaws discussed above, Defendant’s
2 motion depends upon a series of unsubstantiated *factual* assertions concerning (i)
3 the “essentiality” and purpose of the Squishmallow egg/bell shape; (ii) the “essential
4 selling features of the toys”; (iii) the impact on competition of protecting the anime-
5 inspired facial features of the Squishmallow; (iv) the necessity of the Squishmallow
6 textured exterior; (v) the essential qualities of stuffed toys, generally⁴; (vi) the
7 precise stuffing in the Squishmallow, in particular; and (vi) the design of “[a]ll plush
8 toys that fall into the category of anime-inspired plush toys, Kawaii, or cute.” (Mot.
9 12:1-14:23.) The unstated premise of Defendant’s argument appears to be that these
10 assertions are all so obvious that they do not require proof and are, thus, appropriate
11 for determination on a motion to dismiss. Defendant’s position is flatly
12 contradicted, however, by the holdings in *Millennium Laboratories, Clicks Billiards*,
13 and even *Deckers Outdoor*. *Millennium Labs.*, 817 F.3d at 1130-31; *Clicks*
14 *Billiards, Inc.*, 251 F.3d at 1258; *Deckers Outdoor Corp.*, No. CV 15-769 PSG
15 (SSx), 2015 WL 12731929, at fn. 2 (“Accordingly, Defendants’ factual arguments
16 for dismissal based on the functional and generic nature of the Bailey Button Boot
17 Trade Dress, see Mot. 10:4-16:10, are not appropriate for this stage of the
18 proceedings.”). Likewise, Defendant ignores the fact that Kellytoy need only
19 present a plausible set of facts to state a claim for trade dress infringement rather
20 than address each of Defendant’s unsubstantiated factual assertions. *Ashcroft*, 556
21 U.S. at 678. As stated *supra*, Kellytoy as presented a plausible set of facts to
22 support its obligation of non-functionality.

23 Defendant’s reliance on the Central District’s decision in *Aurora World, Inc.*
24 *v. Ty Inc.*, 719 F. Supp. 2d 1115 (C.D. Cal. 2009) is equally misplaced. Defendant
25

26 ⁴ Although Kellytoy could rebut the “essential” nature of each of the elements of the
27 Squishmallow Trade Dress, these are factual issues not appropriate for determination here on a
28 motion to dismiss. Regardless, by way of example, contrary to Defendant’s bald assertion that
“‘light and silky’ memory foam-like stuffing is likewise an essential property of any stuffed toy”
(Mot. 14:1-4), numerous varieties of stuffings are used, beans, polyesters, cottons, hard foam, etc.

1 cites the decision for the dual propositions that (a) the aesthetic features of plush
2 toys are functional because they are essential selling features of the toys; and (b)
3 facial features on such toys are functional since they make the toys look like
4 animals. (Mot. 11:1-16; 13:6-19.) *Aurora World* was decided, however, seven (7)
5 years before the Ninth Circuit in *Millennium Laboratories* made it clear that the
6 notion of aesthetic functionality was to be tested *solely* by reference to the question
7 as to whether the protection of the feature as a trademark would impose a significant
8 non-reputation-related competitive disadvantage. *Millennium Labs.*, 817 F.3d at
9 1128, 1130.

10 Moreover, the holding in *Millennium Laboratories* would, by its very nature,
11 preclude the application of a *per se* rule as to whether a given aesthetic feature is
12 necessarily functional in all cases, since the determination posed by the second step
13 in the analysis (indeed, the entire analysis) is a question of fact. *Mercado Latino,*
14 *Inc.*, No. CV 13-01027 DDP (RNBx), 2017 WL 1356315, at *3; *Millennium Labs.*,
15 817 F.3d at 1129. The decision in *Aurora World* itself concerned a motion for
16 preliminary injunction, the analysis of which required the district court to consider
17 *proof* of Aurora's claims. *Aurora World, Inc.*, 719 F. Supp. 2d at 1124-1125. The
18 record included numerous declarations in support of, and in opposition to, the
19 motion, including testimony and documentary evidence regarding the appearance,
20 development, marketing, and sale of the products at issue, among other things. *Id.*
21 nn.5, 8-9, 11, 13, 15-26, 32-33, 37, 39-40, 46, 49-50, 53, 55, 61, 65-66, 84, 86, 89,
22 92-96, 106, 114, 115.

23 The conclusions reached by the court on such a record cannot properly be
24 applied at the pleading stage of *this* action, where Kellytoy expressly alleges that
25 "the relevant consuming public has come to recognize and associate plush toys
26 bearing the Squishmallow Trade Dress as high quality goods connected with or
27
28

1 offered by a single source, Kellytoy.” (Complaint ¶¶ 23, 46, 58.) Those are
2 assertions of fact which simply cannot be discounted at the pleading stage of this
3 matter.

4 **4. Kellytoy Adequately Identifies Its Trade Dress**

5 In order to survive a motion to dismiss with respect to the description of its
6 trade dress, a plaintiff need only allege “a complete recitation of the concrete
7 elements of its alleged trade dress.” *Lepton Labs, LLC v. Walker*, 55 F. Supp. 3d
8 1230, 1240 (C.D. Cal. 2014). The defendant’s belief that this recitation does not
9 make out a claim for protectable trade dress is not a grounds for dismissal at the
10 pleading state of an action. *Id.* (“A court must test the legal merits of a plaintiff’s
11 alleged trade dress at summary judgment or trial when the parties provide with all
12 relevant, admissible evidence—not at the pleading stage when the court has little
13 more than the plaintiff’s allegations and the defendant’s summary denial of them.”).

14 In this case, the Complaint both depicts and recites the elements of Kellytoy’s
15 trade dress and, like the plaintiff in *Lepton Labs*, alleges that the depiction of the
16 trade dress in its totality makes up the “Squishmallow Trade Dress.” (Complaint ¶
17 22, Ex. 1); *Lepton Labs*, 55 F. Supp. 3d at 1241. The court in *Lepton Labs* found
18 this sufficient, while opining that the Coca-Cola Company could meet this standard
19 by alleging the trade dress of its famous bottle as “a contoured glass or plastic bottle
20 having a plurality of vertical striations extending from the top to the bottom of the
21 bottle and being interrupted by a smooth, horizontal band nearly half way down the
22 bottle.” *Id.* at 1240. *See also, H.I.S.C., Inc. v. Franmar International Importers,*
23 *Ltd.*, CV 3:16-00480-BEN-WVG, 2016 WL 7439355 (S.D. Cal. 2016)(“The
24 combination of Franmar’s written description of its claimed trade dress and the
25 images provided is a sufficient ‘short and plain statement of the claim’ to indicate to
26 Plaintiffs what Franmar alleges is its protectable trade dress [citations omitted].”)

1 For this reason, the rhetorical questions posed in Defendant's motion ("What
2 constitutes a 'complementary' shaped graphics for 'eyes, snouts, and bellies'?⁵
3 What about the contrasting coloring is 'distinctive'? How do the 'simplified Asian
4 style Kawaii faces' 'conform to and support the overall egg/bell-shaped toys'") are
5 all answered by reference to the images of the products at issue.⁶ (*Compare* Mot.
6 pp. 8-9 with Complaint Ex. 1.) Defendant's reliance on this Court's opinion in
7 *Greenberg v. Johnson*, 2014 WL 12586252 (C.D. Cal. 2014), does not help its
8 cause, as in that case the plaintiff acting pro se utterly failed to describe or identify
9 the alleged trade dress – not the case here. Equally misguided, Defendant attempts
10 to show that each element on its own is too broad to constitute protectable trade
11 dress, rather than looking at the combination of all of the elements, as it is required
12 to do under applicable case law. This alone proves fatal to Defendant's motion.

13 Regardless, Defendant's argument regarding Kellytoy's description of the
14 claimed trade dress appears to be less a question of articulation, however, than of
15 overbreadth. For example, on the one hand, Defendant claims to be "at a loss to
16 know what constitutes a 'simplified Asian style Kawaii face'" (Mot. 8:24-25)⁷, but
17 then goes on to acknowledge that "Kellytoy appears to be describing an entire genre
18 of products that have flooded the toy market and broader culture." (Mot. 9:4-6.)
19 Putting aside Defendant's misleading approach of discussing the protectability of

20 ⁵ The relevant portion of Kellytoy's description reads, however, "and
21 complementary rounded/oval shaped graphics depicting features on the characters
22 themselves (such as eyes, snouts and bellies) and which conform to and support the
23 overall egg/bell-shaped of the toys." (*See*, Complaint, at ¶ 22.)

24 ⁶ Once again, Defendant's own authority supports this conclusion. The court
25 in *Deckers Outdoor Corp.* held that pictures of a product combined with a list of the
26 elements of the trade dress were sufficient to put defendants on notice as to the
27 claimed trade dress. *Id.* at *3-4.

28 ⁷ A simple Google search for "Kawaii faces" turns out numerous standard examples
thereof under the images tab of the results page. Anybody in the toy and design fields knows
exactly what is meant by the term. This will be subject to proof as the case progresses –
something not appropriate for consideration at the pleading stage.

1 each individual element of the Squishmallow Trade Dress, in isolation – it well
2 knows that trade dress must be viewed in its entirety, with all of the elements read
3 conjunctively – Defendant goes on to argue that “Kellytoy’s claim to have the
4 exclusive right to manufacture *Kawaii*-style animal plush toys is impermissibly
5 vague and overbroad...” (Mot. 9:6-7.) Similarly, Defendant states “Kellytoy is
6 attempting to use a vague and overly broad definition of a purported trade dress to
7 try and keep Hugfun and other competitors out of the market for plush toys.” (Mot.
8 10:3-4.)⁸ As this argument suggests, problems of overbreadth are better considered
9 as questions of genericness rather than specificity. *Mercado Latino, Inc.*, No. CV
10 13-01027 DDP (RNBx), 2017 WL 1356315, at *2. Questions of genericness,
11 however, are questions of fact. *Yellow Cab Co. of Sacramento v. Yellow Cab of Elk*
12 *Grove, Inc.*, 419 F.3d 925, 929 (9th Cir. 2005).

13 Similarly, Defendant’s claim that “the entire Squishmallow does not have a
14 consistent appearance” is belied by the fact that they all contain all of the numerous
15 elements described at paragraph 22 of the Complaint.

16 Moreover, the case law cited by Defendant supports, rather than undermines,
17 Kellytoy’s contention that the description of the Squishmallow Trade Dress set forth
18 in the complaint adequately defines the design elements that compose the asserted
19 trade dress. In *Greenberg v. Johnston*, CV 14-04606-MWF-VBKx, 2014 WL
20 12586252, cited by Defendant, in contrast to Kellytoy, the pro se plaintiff utterly
21 failed to provide *any* guidance, let alone description, as to the nature of the claimed
22 trade dress. *Greenberg v. Johnston*, CV 14-04606-MWF-VBKx, 2014 WL
23 12586252, *3 (“The FAC does not describe trade dress, nor does it identify which of
24 these accused actions Defendant Richard Johnson undertook.”). *See also, Sleep*
25 *Science Partners v. Lieberman*, CIV. No. 09–04200 CW, 2010 WL 1881770, *3
26

27 ⁸ Aside from being overstated, it is also false, as most plush toys do not contain all of the
28 various features described in the Squishmallow Trade Dress. For example, teddy bears – arguably
one of the most ubiquitous plush toys – do not fit within the Squishmallow Trade Dress.

1 (“Although it has cataloged several components of its website, Plaintiff has not
2 clearly articulated which of them constitute its purported trade dress.”); *Yurman*
3 *Design v. PAJ, Inc.*, 262 F.3d 101, 117 (2nd. Cir. 2001)(“Pressed by PAJ on appeal
4 to provide some description of its trade dress, Yurman produced the following: “the
5 artistic combination of cable [jewelry] with other elements.”). There is simply no
6 reasonable comparison between these nondescript descriptions and Kellytoy’s
7 detailed multi-element description set forth at paragraph 22 of the Complaint.

8 Defendant also argues – without evidence – that various features identified by
9 Kellytoy as part of its Squishmallow Trade Dress “cannot possibly serve as a
10 source-identifying function.” (*E.g.*, Mot. 12:10-11 and 13:10-12.) This proposition
11 is a gloss on the obligation to prove secondary meaning in cases of trade dress
12 infringement involving product designs, imposed by the Supreme Court in *Wal-*
13 *Mart. Wal-Mart Stores, Inc., v. Samra Brothers, Inc.*, 529 U.S. at 216. In order to
14 do so, a plaintiff must demonstrate that the primary significance of its trade dress in
15 the minds of the public is to identify the source of the product rather than the
16 product itself. *Id.* at 211.

17 Like the determination as to whether trade dress is functional, however, the
18 determination as to whether it has acquired secondary meaning is a question of fact.
19 *Clicks Billiards, Inc.*, 251 F.3d at 1262. As a result, the Central District has held
20 that secondary meaning “need only be pled *generally* for purposes of defeating a
21 motion to dismiss.” *Dean v. Cortes*, No. CV 2:18-02335-CAS (JPRx), 2018 WL
22 3425016 (C.D. Cal. July 12, 2018) (emphasis added); *accord Spirit Clothing Co. v.*
23 *N.S. Enters.*, No. CV 13-2203-RGK (PJWx), 2013 WL 12144107 (C.D. Cal. July
24 23, 2013).

25 Moreover, and even if this were not the case, Kellytoy alleges that the
26 Squishmallow Trade Dress has acquired secondary meaning and alleges, in great
27 detail, the manner in which it has done so. (Complaint ¶¶ 21-46, Exhs. 2-5.)
28 Defendant’s attempt to prove that the Squishmallow Trade Dress “cannot possibly

1 serve as a source-identifying function” is simply an improper attempt to resolve a
2 question of fact on a motion to dismiss. *Cook, Perkiss & Liehe, Inc. v. N. Cal.*
3 *Collection Serv.*, 911 F.2d 242, 245 (9th Cir. 1990).

4 Here, Kellytoy’s detailed description of its claimed trade dress is adequate to
5 put defendant on notice, particularly in light of Kellytoy’s inclusion of images of the
6 claimed trade dress in the Complaint. Therefore, Defendant’s motion to dismiss
7 Kellytoy’s claim for trade dress infringement, along with Kellytoy’s related claims
8 for trademark infringement and unfair competition, should be denied.

9 C. KELLYTOY SHOULD BE GRANTED LEAVE TO AMEND

10 It is well-established that, if the court dismisses a complaint for failure to state
11 a claim, leave to amend should be granted unless the court determines that “the
12 allegation of other facts consistent with the challenged pleading could not possibly
13 cure the deficiency.” *Schreiber Distrib. Co. v. Serv-Well Furniture Co., Inc.*, 806
14 F.2d 1393, 1401 (9th Cir. 1986). Federal Rule of Civil Procedure 15(a)(2) similarly
15 provides that leave to amend should be “freely” granted when justice requires. Fed.
16 R. Civ. P. 15(a)(2).

17 In this case, there are no deficiencies in the Complaint. However, if the Court
18 determines that Kellytoy must plead additional facts as to what renders its trade
19 dress non-functional, the specifics of its claimed trade dress, or any other matters,
20 Kellytoy requests leave to amend to cure any defects in its pleading.

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES—GENERAL

Case No. CV-19-07652-MWF (MAAx) Date: December 4, 2019

Title: Kellytoy Worldwide, Inc. v. Hugfun International, Inc., et al.

Present: The Honorable MICHAEL W. FITZGERALD, U.S. District Judge

Deputy Clerk:
Rita Sanchez

Court Reporter:
Not Reported

Attorneys Present for Plaintiff:
None Present

Attorneys Present for Defendant:
None Present

Proceedings (In Chambers): ORDER GRANTING DEFENDANT HUGFUN INTERNATIONAL, INC.’S MOTION TO DISMISS PLAINTIFF’S COMPLAINT PURSUANT TO RULE 12(b)(6) [12]

Before the Court is Defendant Hugfun International, Inc.’s (“Hugfun”) Motion to Dismiss Complaint Pursuant to Rule 12(b)(6) (the “Motion”) filed on October 2, 2019. (Docket No. 12). Plaintiff Kellytoy Worldwide, Inc. (“Kellytoy”) filed an Opposition on October 14, 2019. (Docket No. 19). Defendant filed its Reply on October 21, 2019. (Docket No. 21). Pursuant to the parties’ stipulation, Defendant BJ’s Wholesale Club, Inc. (“BJ’s”) is deemed to have joined in the Motion. (Docket No. 25).

The Motion was noticed to be heard on November 4, 2019. The Court has read and considered the papers filed in this matter and deems the matter appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78(b); Local Rule 7-15. The hearing was therefore **VACATED** and removed from the Court’s calendar.

For the reasons set forth below, Defendants’ Motion to Dismiss is **GRANTED with leave to amend**. Although Plaintiff’s description of the alleged Squishmallows trade dress is sufficiently pleaded, the Court must dismiss Plaintiff’s First Claim for Relief for failing to allege how the trade dress is non-functional. Plaintiff’s Second, Third, and Fourth Claims for Relief are also dismissed because they depend on a proper pleading of the First Claim for Relief.

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I. BACKGROUND

On September 4, 2019, Plaintiff filed a Complaint alleging various federal and California trade dress infringement and unfair competition claims against the Defendants. (*See generally* Compl. ¶¶ 5-8 (Docket No. 1)). Specifically, Plaintiff asserts four claims for relief: (1) trademark infringement, false designation of origin, and false description under section 43 of the Lanham Act, 15 U.S.C. § 1125; (2) common law trademark infringement; (3) California common law unfair competition; and (4) unfair competition under California Business & Professional Code § 17200, *et seq.* (*Id.* ¶¶ 57-80).

The following facts are based on the Complaint, which the Court assumes are true; the Court further construes any inferences arising from these facts in the light most favorable to Plaintiff. *See, e.g., Schueneman v. Arena Pharm., Inc.*, 840 F.3d 698, 704 (9th Cir. 2016) (restating generally-accepted principle that “[o]rdinarily, when we review a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), we accept a plaintiff’s allegations as true ‘and construe them in the light most favorable’ to the plaintiff” (quoting *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 989 (9th Cir. 2009))).

For nearly two decades, Plaintiff has been in the business of manufacturing, distributing, and selling plush toys. (Compl. ¶¶ 17-18). In that time, Plaintiff has developed a reputation for high quality, unique products that are popular with consumers. (*Id.* ¶ 18). In 2016, Plaintiff created its “Squishmallows” line of plush toys, which it markets under the SQUISHMALLOW trademark. (*Id.* ¶ 20). Most of the designs have or are pending approval for U.S. copyright registrations. (*Id.*).

Plaintiff’s Squishmallows line includes a broad range of plush toys. (*Id.* ¶ 22). Plaintiff describes its alleged Squishmallows’ trade dress (the “Trade Dress”) as:

- (1) substantially egg/bell shaped plush toys depicting various similarly shaped fanciful renditions of animals/characters; (2) simplified Asian style Kawaii faces with repeating and complementary rounded/oval shaped

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graphics depicting features on the characters themselves (such as eyes, snouts and bellies) and which conform to and support the overall egg/bell shaped of the toys; (3) embroidered facial features, such as eyes, nostrils, and/or mouths; (4) distinctive contrasting and non-monochrome coloring; and (5) short-pile velvety velour-like textured exterior with a light and silky memory foam-like stuffing providing an extremely soft and squeezable marshmallow feel.

(*Id.*). Plaintiff also includes several photos depicting the Trade Dress. (*Id.*, Ex. 1).

Plaintiff is the sole owner of all rights, title, and interest in and to the Squishmallows line of toys. (*Id.* ¶ 21). Since their creation, Plaintiff has dedicated substantial time, effort, and resources to the promotion of its Squishmallows toys. (*Id.* ¶ 23). For example, Plaintiff is currently spending over \$1 million annually in advertising. (*Id.* ¶ 21). The Squishmallows have been featured in over 300 publications, including mainstream magazines, news articles, reviews, and videos. (*Id.* ¶ 28). The toys have also earned numerous industry awards and recommendations. (*Id.* ¶ 31). Since the summer of 2017, Plaintiff has shipped approximately 40 million units of Squishmallows, and the toys have generated tens of millions of dollars in sales over the past year alone. (*Id.* ¶ 43).

Plaintiff alleges that sometime in 2019, Defendants began selling and distributing plush toys substantially and confusingly similar to Plaintiff's Trade Dress. (*Id.* ¶ 48). Defendant Hugfun allegedly sells the infringing plush toys to Defendant BJ's at a fraction of the price that Plaintiff charges for its toys. (*Id.* ¶ 50). Plaintiff alleges that Defendant Hugfun can do so because it copied the Trade Dress instead of spending resources developing its own product, and because Defendant Hugfun's toys are of inferior quality. (*Id.*). Plaintiff also alleges that Defendants' activities "are likely to confuse, mislead, and deceive Defendants' customers, purchasers, and members of the public as to the origin of the toys." (*Id.* ¶ 52). Thus, Defendants' acts constitute "trademark infringement, unfair competition, unlawful appropriation, unjust enrichment, wrongful deception of the purchasing public, and unlawful trading on

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Kellytoy’s good will and the public acceptance of Kellytoy’s original works.” (*Id.* ¶ 54).

II. LEGAL STANDARD

In ruling on the Motion under Rule 12(b)(6), the Court follows *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and their Ninth Circuit progeny.

“Dismissal under Rule 12(b)(6) is proper when the complaint either (1) lacks a cognizable legal theory or (2) fails to allege sufficient facts to support a cognizable legal theory.” *Somers v. Apple, Inc.*, 729 F.3d 953, 959 (9th Cir. 2013) (citation omitted). “To survive a motion to dismiss, a complaint must contain sufficient factual matter . . . to ‘state a claim to relief that is plausible on its face.’” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). The Court must disregard allegations that are legal conclusions, even when disguised as facts. *See id.* at 681 (“It is the conclusory nature of respondent’s allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth.”). “Although ‘a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof is improbable,’ . . . plaintiffs must include sufficient ‘factual enhancement’ to cross ‘the line between possibility and plausibility.’” *Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 995 (9th Cir. 2014) (quoting *Twombly*, 550 U.S. at 556-57).

The Court must then determine whether, based on the allegations that remain and all reasonable inferences that may be drawn therefrom, the complaint alleges a plausible claim for relief. *See Iqbal*, 556 U.S. at 679; *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1054 (9th Cir. 2011). “Determining whether a complaint states a plausible claim for relief is ‘a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.’” *Ebner v. Fresh, Inc.*, 838 F.3d 958, 963 (9th Cir. 2016) (quoting *Iqbal*, 556 U.S. at 679). Where the facts as pleaded in the complaint indicate that there are two alternative explanations, only one of which would result in liability, “plaintiffs cannot offer allegations that are merely consistent with their favored explanation but are also

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consistent with the alternative explanation. Something more is needed, such as facts tending to exclude the possibility that the alternative explanation is true, in order to render plaintiffs’ allegations plausible.” *Eclectic Props.*, 751 F.3d at 996-97.

III. DISCUSSION

Defendants raise three main arguments in their Motion to Dismiss: (1) the First Claim for Relief should be dismissed because Plaintiff failed to meet its Rule 8 obligation to provide sufficient facts in describing the Trade Dress and alleging that it is non-functional; (2) the First Claim for Relief should be dismissed with prejudice because Plaintiff cannot state a claim under the Lanham Act at all given that the alleged Trade Dress is functional; and (3) the Second, Third, and Fourth Claims for Relief should be dismissed because they are substantially congruent to the First Claim for Relief. (Mot. at 11-21).

A. First Claim for Relief: Lanham Act

To state an infringement claim under section 43(a) of the Lanham Act—whether it be a trademark claim or a trade dress claim—a plaintiff must identify the dress and allege three basic elements: (1) distinctiveness, (2) non-functionality, and (3) likelihood of confusion. *Kendall-Jackson Winery, Ltd. v. E. & J. Gallo Winery*, 150 F.3d 1042, 1046-47 (9th Cir. 1998) (upholding summary judgment ruling that grape leaves are generic emblem for wine and so not subject to trademark protection). Plaintiff is also required to adequately define the trade dress for which it claims protection. *Sleep Sci. Partners v. Lieberman*, No. 09–04200 CW, 2010 WL 1881770, at *3 (N.D. Cal. May 10, 2010) (“Without an adequate definition of the elements comprising the website’s ‘look and feel,’ [defendant] is not given adequate notice.”); *Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101, 116–17, (2d Cir. 2001) (“[W]e hold that a plaintiff seeking to protect its trade dress in a line of products must articulate the design elements that compose the trade dress.”); *see also 1 McCarthy on Trademarks and Unfair Competition* § 8:3 (4th ed. 2014) (“While trade dress is most often defined as a totality of elements, there is no reason why the plaintiff cannot define a list of elements consisting of less than the totality of features. . . . Only then can the court

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and the parties coherently define exactly what the trade dress consists of and determine whether that trade dress is valid and if what the accused is doing is an infringement.”).

“Trade dress is the total image of a product, including features such as size, shape, color, texture, and graphics.” *Moldex-Metric, Inc. v. Mckeon Prods., Inc.*, 891 F.3d 878, 881 (9th Cir. 2018) (internal quotation marks and citation omitted). In evaluating a trade dress claim, a court must not focus on individual elements, “but rather on the overall visual impression that the combination and arrangement of those elements create.” *Clicks Billiards, Inc. v. Sixshooters, Inc.*, 251 F.3d 1252, 1259 (9th Cir. 2001). “Trade dress is the composite tapestry of visual effects.” *Id.*

1. Description of the Alleged Trade Dress

Defendants allege that “Kellytoy’s Complaint fails to provide Hugfun and the Court with a detailed and precise description of its alleged ‘Squishmallow Trade Dress.’” (Mot. at 11). According to Defendants, the description of the Trade Dress “offers only superficial insight into the scope or nature of Kellytoy’s alleged trade dress.” (*Id.* at 8). For example, Defendants question the meaning of Plaintiff’s reference to a “simplified Asian style Kawaii face,” or its description of “complementary rounded/oval shaped graphics.” (*Id.* at 8-9). Defendants argue that these terms are too broad and vague to give sufficient notice under Rule 8. (*Id.*). Finally, Defendants point out that the images that Plaintiff filed as Exhibit 1 to the Complaint reveal that there is no “sufficiently precise trade dress that covers the entire line.” (*Id.* at 9).

In response, Plaintiff argues that its Complaint “both depicts and recites the elements of Kellytoy’s trade dress and . . . alleges that the depiction of the trade dress in its totality makes up the ‘Squishmallow Trade Dress.’” (Opp’n at 20). Plaintiff dismisses Defendants’ arguments as misguided for focusing on individual elements instead of assessing them in their combined form. (*Id.* at 21).

The Court finds that Plaintiff’s Trade Dress description satisfies the requirements of Rule 8. In its Complaint, Plaintiff describes the Trade Dress in detail

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and attaches photos of its line of plush toys. (Compl. ¶ 22 & Ex. 1). Specifically, the Complaint includes a description of the Trade Dress’s shape (“substantially egg/bell shaped”); color combinations (“distinctive contrasting and non-monochrome coloring”); and texture (“short-pile velvety velour-like textured exterior with a light and silky memory foam-like stuffing providing an extremely soft and squeezable marshmallow feel”). (*Id.* ¶ 22).

Plaintiff also describes the Trade Dress’s graphics as “simplified Asian style Kawaii faces with repeating and complementary rounded/oval shaped graphics depicting features on the characters themselves (such as eyes, snouts and bellies) and which conform to and support the overall egg/bell shape of the toys.” (*Id.*). Defendants argue that this description is vague and overbroad, and that Plaintiff is attempting to claim the exclusive right to manufacture plush toys with “Asian style Kawaii faces.” (Mot. at 12; Reply at 7). Defendants err in focusing on this feature on its own instead of the “composite tapestry of visual effects” that it creates along with the Trade Dress’s shape, colors, and texture. *See Clicks*, 251 F.3d at 1259 (“[I]t is crucial that we focus *not* on the individual elements, but rather on the overall visual impression that the combination and arrangement of those elements create.”). For example, the Trade Dress as described does not appear to cover monochromatic animal plush toys with “Asian style Kawaii faces” that have proportionally-sized limbs.

In short, the Court finds that the overall description of the Trade Dress gives Defendants sufficient notice to survive dismissal. *See, e.g., Deckers Outdoor Corp. v. Fortune Dynamic, Inc.*, No. CV 15-769 PSG (SSx), 2015 WL 12731929, at *3-4 (C.D. Cal. May 8, 2015) (accepting description listing several elements of the alleged trade dress accompanied by photographs). The question now is whether the Court should nonetheless dismiss Plaintiff’s Complaint due to defects in claiming non-functionality.

2. Non-functionality

Defendants raise two different issues with Plaintiff’s allegation of non-functionality. First, Defendants argue that Plaintiff failed to plead non-functionality adequately as required by *Iqbal*. (Mot. at 14; Reply at 5). Second, Defendants urge

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the Court to evaluate the Trade Dress’s functionality at this stage and conclude that Plaintiff cannot state a claim for trade dress protection. (Mot. at 15) (quoting *Iqbal*, 556 U.S. at 679).

As previously noted, a plaintiff must allege non-functionality to state a claim for trade dress protection under the Lanham Act. *See Moldex-Metric*, 891 F.3d at 881 (“No protection under the Lanham Act is available if the claimed trade dress is functional.” (citing *Traffix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23, 29 (2001))). Defendants argue that Plaintiff’s non-functionality assertion in the Complaint is conclusory and devoid of factual support. (Mot. at 14; Reply at 8-10). Citing to *Deckers*, Defendants argue that Plaintiff must allege “how” the Trade Dress is non-functional. 2015 WL 12731929, at *4 (citing cases). Plaintiff counters that it has alleged sufficient facts regarding non-functionality. (Opp’n at 13) (citing Compl. ¶¶ 22, 58-64, Ex. 1).

Plaintiff failed to plead sufficient facts in support of its assertion that the Trade Dress is non-functional. Plaintiff’s only mention of functionality in the Complaint is the conclusory statement that “[t]he Squishmallow Trade Dress is non-functional.” (Compl. ¶ 58). Although Plaintiff does not have to plead “detailed factual allegations” in its Complaint, Rule 8 does require sufficient facts to “state a claim to relief that is plausible on its face,” including how the Trade Dress is non-functional. *Iqbal*, 556 U.S. at 678 (citation omitted). Multiple courts in this district have adopted this approach. *See, e.g., Deckers*, 2015 WL 12731929, at *3-4 (“The Court holds that Plaintiff’s conclusory statement of non-functionality fails to sufficiently allege the element.”); *Green Crush LLC v. Paradise Splash I, Inc.*, No. CV 17-1856 CJC (JDEx), 2018 WL 4940824, at *4 (C.D. Cal. Mar. 8, 2018) (same); *Virgin Scent, Inc. v. Bel Air Naturals Care Corp.*, No. CV 17-8284 AB (RAOx), 2018 WL 5264145, at *4 (C.D. Cal. Feb. 8, 2018) (same).

Defendants appear to be advocating for dismissal without leave to amend based on their contention that the Trade Dress is functional, and thus, not entitled to protection under the Lanham Act. The Court rejects Defendants’ arguments for two reasons. First, simply because Plaintiff has *yet* to plead non-functionality adequately

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does not mean that Plaintiff could not possibly do so. It is premature to ask the Court to rule on the issue without an understanding of what Plaintiff's "claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 555 (citation omitted).

Second, to the extent that Defendants are claiming that functionality is obvious from the face of the Complaint, the Court disagrees with their conclusion. "Functionality is generally viewed as an intensely factual issue." *Millennium Labs., Inc. v. Ameritox, Ltd.*, 817 F.3d 1123, 1129 (9th Cir. 2016) (alteration and citation omitted). The Court sees no reason to deviate from the well-established approach that functionality should not be resolved at this stage. *See Five Star Gourmet Foods, Inc. v. Ready Pac Foods, Inc.*, No. CV 18-2436, 2019 WL 1260634, at *4 (C.D. Cal. Mar. 18, 2019) ("[C]ourts have held that [functionality] cannot be resolved at the motion to dismiss stage." (citing cases)); *see also Virgin Scent*, 2018 WL 5264145, at *5 ("The Court agrees that functionality is a question of fact that is generally not suitable to disposition on a motion to dismiss." (citing cases)); *Deckers*, 2015 WL 12731929, at *5 (same). Indeed, a quick glance at the Parties' pleadings reveal numerous disputes of fact and law interwoven into each prong of the multi-step functionality analysis established by the Supreme Court and Ninth Circuit. Thus, the Court will not entertain the merits of functionality at this stage.

Accordingly, because Plaintiff failed to plead non-functionality adequately, Defendants' Motion is **GRANTED *without prejudice*** as to Plaintiff's First Claim for Relief under the Lanham Act.

B. Second, Third, and Fourth Claims for Relief

Defendants argue that Plaintiff's common law trademark infringement and state law claims fail because Plaintiff has not stated a claim for protection under the Lanham Act. (Mot. at 21). The Court agrees that these claims are not adequately pled unless Plaintiff corrects the defect in pleading non-functionality. *See M2 Software, Inc. v. Madacy Entm't*, 421 F.3d 1073, 1080 (9th Cir. 2005) ("The test of trademark infringement under state, federal, and common law is whether there will be a likelihood of confusion." (citation omitted)); *Cleary v. News Corp.*, 30 F.3d 1255,

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES—GENERAL

Case No. CV-19-07652-MWF (MAAx) Date: December 4, 2019

Title: Kellytoy Worldwide, Inc. v. Hugfun International, Inc., et al.

1262-63 (9th Cir. 1994) (“[A]ctions pursuant to California Business and Professions Code § 17200 are substantially congruent to claims made under the Lanham Act.” (citations omitted)). Therefore, Defendants’ Motion is likewise **GRANTED *with leave to amend*** as to the Second, Third, and Fourth Claims for Relief.

Accordingly, Defendants’ Motion is **GRANTED *with leave to amend*** to cure the defect as to the non-functionality claim. Plaintiff shall file a First Amended Complaint on or before **December 20, 2019**. Defendant shall file a response to the operative Complaint by **January 10, 2020**.

IT IS SO ORDERED.

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Worldwide, Inc.*

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA – WESTERN DIVISION

KELLYTOY WORLDWIDE, INC., a
California corporation,

Plaintiff,

vs.

HUGFUN, INTERNATIONAL, INC.
a/k/a Hugfun Int'l Inc., a Hong Kong
entity of unknown form, BJ'S
WHOLESALE CLUB, INC., a
Massachusetts corporation, and DOES 1
through 10, inclusive,

Defendants.

Case No. 2:19-cv-07652-MWF-MAA

FIRST AMENDED COMPLAINT FOR:

- 1. FEDERAL TRADEMARK
INFRINGEMENT, FALSE
DESIGNATION OF ORIGIN
AND FALSE DESCRIPTION
(15 U.S.C. § 1125);**
- 2. COMMON LAW TRADEMARK
INFRINGEMENT;**
- 3. CALIFORNIA COMMON LAW
UNFAIR COMPETITION; AND**
- 4. CALIFORNIA STATUTORY
UNFAIR COMPETITION.**

DEMAND FOR JURY TRIAL

Plaintiff KELLYTOY WORLDWIDE, INC., a California corporation
("Kellytoy") brings this action against defendant HUGFUN, INTERNATIONAL,
INC. a/k/a Hugfun Int'l Inc., a Hong Kong entity of unknown form ("Hugfun"),
BJ'S WHOLESALE CLUB, INC., a Massachusetts corporation, and DOES 1
through 10 (collectively, "Defendants") for injunctive relief and damages under the
laws of the United States and the State of California as follows:

JURISDICTION AND VENUE

1. This action arises under the trademark laws of the United States, 15
U.S.C. § 1125(a), and under the statutory and common law of trademark/trademark

1 infringement and unfair competition.

2 2. This Court has jurisdiction under 28 U.S.C. §§ 1331, 1338, and 1367,
3 and 15 U.S.C. §§ 1116, 1117, 1121, and 1125.

4 3. Venue lies in this judicial district pursuant to 28 U.S.C. § 1391.

5 4. This Court has personal jurisdiction over Defendants, as they are doing
6 business in California and this District and are subject to the jurisdiction of this
7 Court. Indeed, Hugfun is headquartered in and actively distributes plush toys
8 throughout the state of California and this District. And, BJ's purchases goods,
9 including the Infringing Plush, from defendant Hugfun, a California resident, and
10 operates a website through which it offers for sale and sells numerous goods,
11 including the Infringing Plush, to customers within the state of California and this
12 District. In addition, defendants Hugfun and BJ's knowingly infringed on
13 Kellytoy's trade dress, knowing that Kellytoy is a California resident and knowing
14 that Kellytoy would suffer harm, particularly, in the State of California, and thereby
15 purposefully directed and expressly aimed their activities towards California.

16 **NATURE OF THE ACTION**

17 5. This is an action for trade dress infringement, trademark infringement,
18 unfair competition and false designation of origin under the Lanham Act, 15 U.S.C.
19 § 1125(a), California Bus. & Prof. Code § 17200, *et seq.*, and the common law.

20 6. Kellytoy's SQUISHMALLOW branded plush toys ("Squishmallows")
21 – representative samples of which are depicted in **Exhibit 1** hereto – are one of the
22 world's hottest plush toy lines. Kellytoy's Squishmallows feature a highly
23 distinctive and widely recognized trade dress, which Kellytoy pioneered and
24 created. Kellytoy actively markets its Squishmallows through numerous media
25 outlets, including, without limitation, on social media, at tradeshow, through
26 Squishmallows.com, amazon.com, walmart.com, walgreens.com and target.com,
27 and on Kellytoy's website and social media accounts, depicting images of its
28 proprietary Squishmallows line of plush toys.

1 online e-commerce website that sell various merchandise, including plush toys.

2 15. The true names and capacities of defendants sued herein as DOES 1-
3 10, inclusive, are unknown to Kellytoy, who therefore sues said defendants by such
4 fictitious names. Kellytoy will amend this Complaint to allege their true names and
5 capacities when the same are ascertained.

6 16. Upon information and belief, at all relevant times mentioned in this
7 Complaint, Defendants, and each of them, were acting in concert and active
8 participation with each other in committing the wrongful acts alleged herein, and
9 were the agents of each other and were acting within the scope and authority of that
10 agency and with the knowledge, consent and permission of one another.

11 **BACKGROUND FACTS**

12 **Kellytoy and Its Protected Intellectual Property Rights**

13 17. Kellytoy is an innovative and highly successful creator, manufacturer,
14 distributor and seller of unique plush toys, including, without limitation, its
15 Squishmallows line of plush under the SQUISHMALLOW brand. (*See, e.g.,*
16 **Exhibit 1.**)

17 18. Kellytoy has been in business for nearly two decades and in that time
18 has developed a reputation for producing high quality, unique, creative and
19 innovative plush toys that are highly prized in the industry and in widespread
20 demand by the consuming public.

21 19. Kellytoy devotes extensive time and resources promoting and
22 preserving its image and identity and the image and identity of its high quality plush
23 toys. That includes, without limitation, creating distinctive designs and marks for
24 use on its products and seeking U.S. trademark and copyright registrations for such
25 designs and marks, including those at issue in this Complaint.

26 20. In 2016, Kellytoy conceived of and began creating its Squishmallows
27 line of plush toy designs – ultimately marketed in connection with the
28 SQUISHMALLOW trademark – that share common, unique features distinguishing

1 them from the goods of others. Most of these designs are the subject of United
2 States Copyright Registrations or pending applications therefor.

3 21. Indeed, Kellytoy has been and is the sole owner of all right, title and
4 interest in and to the Squishmallows line that possesses unique, recognizable and
5 distinguishing features that are common across much of the Squishmallows line.
6 From 2016 to the present, Kellytoy has expended large sums of money in developing,
7 advertising and promoting these product designs through the United States. In fact,
8 Kellytoy is spending over \$1,000,000 annually in direct to consumer and business-to-
9 business advertising in connection with its SQUISHMALLOW branded goods.

10 22. Consistent with that advertising and marketing scope, Kellytoy sells a
11 broad range of SQUISHMALLOW branded plush toys featuring the brand's iconic
12 trade dress, and whose overall look, feel and image – and in particular but without
13 limitation its shapes, colors, textures and graphics – serve as a distinctive source
14 identifier to the consuming public. Though not easily reduced to writing, these
15 features include: (1) substantially egg/bell shaped plush toys depicting various
16 similarly shaped fanciful renditions of animals/characters; (2) simplified Asian style
17 Kawaii faces with repeating and complementary rounded/oval shaped graphics
18 depicting features on the characters themselves (such as eyes, snouts and bellies) and
19 which conform to and support the overall egg/bell shape of the toys; (3) embroidered
20 facial features, such as eyes, nostrils, and/or mouths; (4) distinctive contrasting and
21 non-monochrome coloring; and (5) short-pile velvety velour-like textured exterior
22 with a light and silky memory foam-like stuffing providing an extremely soft and
23 squeezable marshmallow feel. These features, and the resulting overall look and feel
24 of the toys bearing them, are more fully depicted, without limitation, in **Exhibit 1**
25 hereto – features common to Kellytoy's line of Squishmallows (collectively together
26 with **Exhibit 1** the "Squishmallow Trade Dress").

27 23. Kellytoy has, beginning in 2016 and continuing without interruption,
28 expended a great deal of time, effort, and money in the promotion of its

1 Squishmallows. And due to Kellytoy's unique design, robust marketing efforts,
2 media coverage, and market penetration, the Squishmallow Trade Dress has
3 acquired distinctiveness in the marketplace when applied to plush toys. Indeed,
4 because of Kellytoy's extensive promotional activities and widespread display of its
5 Squishmallows directed to the public, and as a consequence of Kellytoy's fair and
6 honorable dealings with its customers, the relevant consuming public has come to
7 recognize and associate plush toys bearing the Squishmallow Trade Dress as high
8 quality goods connected with or offered by a single source, Kellytoy. The
9 Squishmallow Trade Dress thus embodies valuable goodwill and consumer
10 recognition associated with it and has come to symbolize the valuable goodwill and
11 reputation of Kellytoy.

12 24. In addition to being original and inherently distinctive, the
13 Squishmallow Trade Dress is widely recognized by consumers. A simple Internet
14 search using the Google search engine yields about 1,210,000 "results" for the
15 search term "Squishmallows."

16 25. In addition to marketing and selling them through thousands of retail
17 stores nationwide, Kellytoy markets and sells its Squishmallows on its website
18 <squishmallows.com> featuring dozens of copyright-protected photographs of its
19 plush toys and models holding its Squishmallows. Copies of the homepage and
20 other representative pages from <squishmallows.com> are attached as **Exhibit 2**.

21 26. Kellytoy's Squishmallow website traffic has, not surprisingly, grown
22 exponentially since its launch in 2017, and has now reached an average in excess of
23 5,500 visits per day.

24 27. Kellytoy also actively engages in promoting its line of Squishmallows
25 branded plush toys through its numerous social media accounts, including on
26 Instagram, Facebook, and Twitter. Indeed, Kellytoy's legion of loyal fans of its line
27 of Squishmallows branded plush toys have been extremely engaged on social media,
28 including Facebook and Instagram, demonstrating their awareness and affection for

Kellytoy's Squishmallows. For example, the average Squishmallows post likes on Instagram, for example, hovering over 2000+ per post and 45-100 average comments per post. In fact, Kellytoy's Squishmallows branded plush toys have garnered over 200 Million media impressions.

28. Further adding to their recognition and secondary meaning in the marketplace, Squishmallows have been featured in over 300 publications, including magazines, press articles, reviews, and videos, as set forth in greater detail in **Exhibit 3** hereto, including many mainstream media publications such as the *Washington Post*, the *Chicago Tribune*, the *Daily Harold*, *Okay! Magazine*, among others. By way of example only, Squishmallows have been also recognized by: (1) The *Washington Post* and *Consumer Reports* on their 2017 Holiday Gift Guides; (2) *LA Parent* in its October 2017 issue, under the "Products We Love" section, which specifically identified Squishmallows; and (3) *OK! Magazine* in its August 21, 2017 issue, which, as depicted below, featured Squishmallows and described them in flattering terms, stating "Cuddly as they are cute, they make great couch pals, pillows and bedtime buddies in any home. Collect the whole squad! squishmallows.com."



1 29. There are many additional examples of the popularity and market
2 penetration of the Squishmallow line. Squishmallows were also been featured in the
3 October 2017 issues of *L.A. Parent Magazine*, *City Parent Magazine*, and *San*
4 *Diego Family Magazine* and included in the 2017 gift guides for various
5 publications, including in *The Washington Post*, *The Houston Chronicle*, and *L.A.*
6 *Parent*.

7 30. In fact, Kellytoy's Squishmallows sold out through Walgreens.com
8 during their Gift of the Week promotion in early November 2017, as well as
9 exceeding all sales goals for the campaign, both online and in stores.

10 31. Kellytoy's Squishmallows have also been the subject of numerous
11 industry awards and product recommendation lists, including by the National
12 Parenting Product Awards, Parents' Choice, and TTPM, as more fully set out in
13 **Exhibit 3**. In fact, Kellytoy's Squishmallows were named by *Toy Insider* as one of
14 the "Top Holiday Toys," made the cover the September/October 2017 *Toy Book*
15 *Magazine*, and have been featured in numerous other trade magazines, such as,
16 *Teddy Bear and Friends Magazine* and *Animal Tales Magazine*.

17 32. The popular blog *Trendy Mom Reviews* listed Squishmallows as one of
18 The Best Gifts for 2018!" Similarly, the popular blog *Two Kids And A Coupon* did
19 its own review of Kellytoy's Squishmallows branded plush, saying, among other
20 things, that they are "a gift for anyone on our list this holiday!"

21 33. Squishmallows was also named one of "The Best New Toys" by
22 Minnesota Parent Magazine! and was named a Great Holiday Gifts For Littles by
23 Texas Lifestyle Magazine!

24 34. *Gifts & Decorative Accessories* also selected Kellytoy's
25 Squishmallows branded toys among its "5 Editor's Picks From Toy Fair" 2019.

26 35. *The Toy Insider* featured Kellytoy's Squishmallows branded toys in
27 connection with its March 13, 2019 article entitled "Tips for Tackling Testing &
28 Student Stress."

1 36. Kellytoy's Squishmallows were featured on the cover of *The Toy*
2 *Book's* "Plush Issue" and its Toy Fair New York 2019 issue. *The Toy Book* also
3 featured Kellytoy's upcoming Halloween Squishmallows line on August 5, 2019
4 and featured Kellytoy's Squishmallows branded turtle on May 15, 2019.

5 37. *TFE Toys & Family Entertainment* also featured Kellytoy's
6 Squishmallows branded toys in its NYC Toy Fair 2019 issue.

7 38. Kellytoy's Squishmallows branded toys have also won the *Parent and*
8 *Teacher Choice Award* for 2019 from HowtoLearn.com.

9 39. This widespread publicity and recognition has occurred in conjunction
10 with Kellytoy's advertising efforts concerning Squishmallows, which, as alleged
11 above, have comprised consistent and elaborate marketing campaigns, including
12 email campaigns, social media posts, and direct to consumer advertising. Kellytoy's
13 Squishmallows currently more than 96,000 Instagram followers, more than 77,000
14 Facebook followers – more than many longer-existing and well-known plush
15 brands. To its followers, Kellytoy regularly publishes photographs of its
16 Squishmallows. Many of these followers, in turn, share these posts with their
17 friends and social media followers. A copy of Squishmallows Instagram page is
18 attached as **Exhibit 4**.

19 40. In addition, hundreds of well-known YouTube influencers and vloggers
20 have shared and posted images and videos of themselves holding plush toys in
21 Kellytoy's line of Squishmallows products. Tens of thousands of consumers have
22 done the same through numerous media platforms, including, Facebook, Instagram,
23 Pinterest and YouTube. These posts have generated millions of "likes" and "shares."

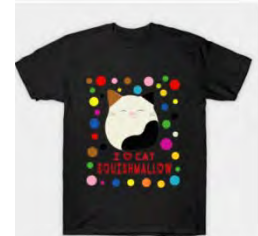
24 41. Kellytoy's Squishmallows are listed amongst the leading global brands
25 and toys such as Hatchimals, Hasbro, RB, Hot Wheels, NERF, and Spin Master by
26 several industry publications.

27 42. As a direct result of Kellytoy's efforts at promoting and building its
28 brand, Kellytoy's Squishmallows line has exploded in popularity, creating

1 substantial demand for and interest in Squishmallows, and generating enormous
2 goodwill in the Squishmallows brand and the Squishmallows Trade Dress in the
3 United States and around the world. In fact, Kellytoy's Squishmallows are sold
4 through hundreds of retailers including some of the largest retailers in the country,
5 including, approximately 1000 Costco stores, 5,500 Walmart stores, 8,500
6 Walgreens stores, 6200 CVS stores, 4,000 Kroger supermarkets and Fred Meyer
7 stores, 1,800 Target stores, 700 Justice stores, 900 Party City stores, amongst other
8 outfits such as Dave & Busters, Knotts Berry Farms and numerous others.

9 43. Since the summer of 2017, Kellytoy has shipped approximately a
10 whopping 40 million (40,000,000) units of Squishmallows and there is no indication
11 that sales will be slowing down anytime soon. Kellytoy's Squishmallows products
12 embodying the Squishmallows Trade Dress have yielded tens of millions of dollars
13 of sales in the U.S. over the past year.

14 44. The pace of sales of Kellytoy's Squishmallows branded toys has been
15 steadily increasing in there is no indication of their popularity waning any time
16 soon. In fact, Kellytoy's Squishmallows branded toys have become so popular
17 among, sought after by, and recognizable as a brand by the public that some
18 members of the public have been selling unauthorized merchandise, such as T-shirts
19 and jewelry, bearing the images of some of Kellytoy's most popular Squishmallows
20 branded toys. Few plush lines can boast having third parties attempt to
21 "merchandise" its copyrighted designs – something typically reserved for Disney,
22 Looney Tunes, and the like. While Kellytoy has since put a stop to such
23 unauthorized uses, it has preserved exemplars of some such infringements by three
24 different infringers, as depicted below:





45. In fact, because of the immense popularity – no, ubiquity – of Kellytoy’s Squishmallows line of plush toys, including those set forth on **Exhibit 1**, Kellytoy has recently embarked on a global licensing initiative to license these designs to include diverse categories of merchandise, including apparel, sleepwear, accessories, headwear, home decor, health and beauty, back to school, stationery and paper goods, games and puzzles, novelty, publishing and magazines, food and beverage, and mobile gaming. (*See, e.g., Exhibit 5* hereto.)

46. Because of Squishmallows’ massive success and popularity, consumers have come to associate Kellytoy’s high-quality Squishmallows plush toys with the Squishmallows Trade Dress and, conversely, have come to recognize the Squishmallow Trade Dress as a designation of source.

Defendants’ Unlawful Conduct

47. At the outset, none of the defendants to this action is licensed or otherwise authorized by Kellytoy to market or distribute products bearing or embodying Kellytoy’s Squishmallow Trade Dress.

48. Upon information and belief, sometime in 2019, notably well after Kellytoy established its reputation in its Squishmallow Trade Dress and that Trade Dress acquired distinctiveness in the marketplace, Defendant Hugfun began offering for sale and supplying various plush toys bearing substantially and confusingly

1 similar copies of Kellytoy's Squishmallow Trade Dress (hereinafter referred to as
2 "Infringing Plush") to customers throughout the United States. Photographs of the
3 Infringing Plush bearing Hugfun's trademarks are collectively attached hereto as
4 **Exhibit 6.**

5 49. Upon information and belief, Defendants manufactured in, and
6 imported from, China the Infringing Plush into the United States for the purpose of
7 having the Infringing Plush enter interstate commerce and/or to be transported or
8 used in interstate commerce through the same channels of trade through which
9 Kellytoy sells its Squishmallows branded plush. On information and belief, Hugfun
10 has in fact sold the Infringing Plush to, among others, the popular big box retailer
11 BJs which has in turn sold and is currently selling the Infringing Plush in interstate
12 commerce.

13 50. Upon information and belief, Hugfun has agreed to sell the Infringing
14 Plush to its customers, including defendant BJ's, at prices that were/are relatively
15 lower than the prices charged by Kellytoy for its Squishmallows plush. Kellytoy is
16 informed and believes that Hugfun is able to undercut Kellytoy's sales prices
17 because, rather than investing in creating its own designs and identity, Hugfun has
18 instead copied and infringed Kellytoy's proprietary Squishmallow Trade Dress and
19 otherwise because its Infringing Plush are of inferior quality as compared to
20 Kellytoy's SQUISHMALLOW branded plush.

21 51. Kellytoy is further informed and believes that Defendants, without
22 Kellytoy's consent or permission, sell, advertise, promote, display, and distribute,
23 toys bearing Squishmallow Trade Dress in United States commerce.

24 52. The activities of Defendants in copying, distributing, advertising,
25 selling, offering for sale and otherwise using the Squishmallow Trade Dress
26 embodied in the Infringing Plush – including by copying wholesale of the shape and
27 look – constitute false designation of origin regarding sponsorship of those plush
28 toys and falsely represent to the public that Defendants' plush toys originate from

1 Kellytoy, and/or that Defendants' plush toys have been sponsored, approved or
2 licensed by Kellytoy, or in some way affiliated or connected with Kellytoy. Such
3 activities of Defendants are likely to confuse, mislead, and deceive Defendants'
4 customers, purchasers, and members of the public as to the origin of the toys bearing
5 the Squishmallow Trade Dress, or to cause such persons to believe that Defendants'
6 Infringing Plush and/or Defendants have been sponsored, approved, authorized, or
7 licensed by Kellytoy or in some way affiliated or connected with Kellytoy, all in
8 violation of, among other laws, 15 U.S.C. §1125(a).

9 53. Upon information and belief, the activities of Defendants were done
10 willfully with full knowledge of the falsity of such designations of origin and false
11 descriptions or representations, with the intent to trade on the enormous goodwill
12 Kellytoy has earned in its Squishmallows, and with the intent to cause confusion,
13 and to mislead and deceive the purchasing public into believing that the products
14 Defendants sell are directly sponsored by, authorized, by, associated with, or
15 originate from Kellytoy.

16 54. Defendants, by their unauthorized copying and use of Kellytoy's
17 Squishmallow Trade Dress, have engaged and will engage in acts of trademark
18 infringement, unfair competition, unlawful appropriation, unjust enrichment,
19 wrongful deception of the purchasing public, and unlawful trading on Kellytoy's
20 good will and the public acceptance of Kellytoy's original works. Defendants'
21 activities have damaged and will continue to damage the reputation, business and
22 good will of Kellytoy nationally and in this judicial district.

23 55. Upon information and belief, unless enjoined by the Court, Defendants
24 will continue and further escalate their infringing activities.

25 56. Kellytoy has no adequate remedy at law. Thus, these activities of
26 Defendants have caused and, if not enjoined, will continue to cause irreparable,
27 immediate and impending harm and damage to Kellytoy's business, and to the
28 business, business reputation and good will of Kellytoy.

FIRST CAUSE OF ACTION

**(Trademark Infringement, False Designation of Origin and False Description -
- 15 U.S.C. §1125)**

(Against All Defendants)

57. Kellytoy repeats and realleges each and every allegation of paragraphs 1 through 56 above as if fully set forth herein.

58. The Squishmallow Trade Dress – comprised of a proprietary combination of aesthetic and stylized plush toy features, including the shape, color, color combinations, texture and graphics – is non-functional and highly distinctive, and has become associated in the minds of the consuming public with plush toy products of the highest quality and reputation finding their origin in a single source, Kellytoy. Indeed, the Squishmallow Trade Dress when viewed as a whole – comprised of a combination of aesthetic and stylized plush toy features, including the shape, color, color combinations, texture and graphics – presents a non-functional look and feel that is uniquely associated with Kellytoy’s Squishmallows. The non-functional nature of these aesthetic features are evidenced and clear, in part, by reference to the following: (1) the unique combination of stylistic elements yielding no utilitarian advantage; (2) the innumerable alternative stylistic plush toy features available to and used competitors, including, (i) countless alternative plush toy shapes (e.g., traditional animal designs as opposed to Kellytoy’s whimsical, abstract renditions of animals, cube shaped plush toys, etc.), (ii) numerous alternative means to depict facial features (e.g., plastic eyes, traditional plush toy facial features, etc.), (iii) myriad alternative shell materials (e.g., terrycloth, long pile plush, velboa, satin, etc.), and (iv) countless alternative stuffing materials available (e.g., beans, cotton, hard foam, etc.); furthermore, when the features of the Squishmallow Trade Dress are viewed collectively – as the law provides in assessing trade dress – it is clear that there are innumerable alternative plush designs actually used and available to competitors in the marketplace; (3) Kellytoy’s not

1 touting or marketing utilitarian advantages of its Squishmallow Trade Dress, and (4)
2 the Squishmallow Trade Dress not resulting from a comparatively simple or
3 inexpensive method of manufacture vis-à-vis other plush toys. Moreover, protection
4 of the Squishmallow Trade dress as a trademark would not impose a non-reputation-
5 related competitive disadvantage. Regardless, however, the product features of the
6 Squishmallow Trade Dress do not serve an aesthetic function wholly independent of
7 any source identifying function. To the contrary, the Squishmallow Trade Dress
8 was specifically designed to distinguish – and has succeeded in distinguishing – the
9 source of products embodying the Squishmallow Trade Dress from the source of
10 other toys. Kellytoy owns all right, title and interest in and to the Squishmallow
11 Trade Dress.

12 59. Without Kellytoy’s authorization or consent, and having knowledge of
13 Kellytoy’s prior rights in the Squishmallow Trade Dress, Defendants have designed,
14 manufactured, imported, distributed, advertised, offered for sale and/or sold and/or
15 will continue to import, distribute, advertise, offer for sale, and sell replicas of the
16 Squishmallow Trade Dress to the consuming public in direct competition with
17 Kellytoy, in or affecting interstate commerce.

18 60. The Infringing Plush designs are confusingly similar to the
19 Squishmallow Trade Dress. Defendants’ use of the Squishmallow Trade Dress has
20 caused and, unless enjoined by this Court, will continue to cause a likelihood of
21 confusion and deception of members of the public and, additionally, injury to
22 Kellytoy’s goodwill and reputation as symbolized by the Squishmallow Trade Dress.

23 61. Defendants’ use and further threatened uses of the Squishmallow Trade
24 Dress thus constitutes trade dress infringement, false designation of origin and
25 unfair competition in violation of 15 U.S.C. § 1125(a).

26 62. As a direct and proximate result of Defendants’ unlawful conduct,
27 Defendants have misappropriated Kellytoy’s rights in the Squishmallow Trade
28 Dress, as well as the goodwill associated therewith, and have diverted sales and

1 profits from Kellytoy to Defendants. Thus, as a direct and proximate result of
2 Defendants' acts of willful infringement, Kellytoy has suffered and/or will suffer
3 damage to its valuable brand and reputation, and other damages in an amount to be
4 proven at trial, including Defendants' profits and Kellytoy's lost profits.

5 63. Defendants' actions described above will cause, have caused, and will
6 continue to cause irreparable damage to Kellytoy, unless Defendants are restrained
7 by this Court. Kellytoy has no adequate remedy at law with regard to Defendants'
8 infringing conduct. Accordingly, Kellytoy is entitled to a preliminary and
9 permanent injunction, pursuant to 15 U.S.C. § 1116, restraining and enjoining
10 Defendants' and their agents, servants, and employees, and all persons acting
11 thereunder, in concert with, or on their behalf, from using Kellytoy's Squishmallow
12 Trade Dress, or any colorable imitation or variation thereof, in connection with the
13 sale and/or marketing of any products.

14 64. Defendants' aforesaid acts are exceptional within the meaning of 15
15 U.S.C § 1117.

16 **SECOND CAUSE OF ACTION**

17 **(Common Law Trademark Infringement)**

18 **(Against all Defendants)**

19 65. Kellytoy repeats and re-alleges each and every allegation of paragraphs
20 1 through 61 as though fully set forth herein.

21 66. Defendants have violated Kellytoy's exclusive common law rights in
22 the Squishmallow Trade Dress.

23 67. Kellytoy has continuously used its Squishmallow Trade Dress to
24 identify its goods in California and elsewhere, and to distinguish them from goods
25 of a different origin. As such, Kellytoy has common law rights to the Squishmallow
26 Trade Dress.

27 68. Defendants' acts described above constitute trade mark infringement
28 under the common laws of the United States, including California.

THIRD CAUSE OF ACTION

(California Common Law Unfair Competition)

(Against all Defendants)

69. Kellytoy repeats and re-alleges each and every allegation of paragraphs 1 through 61, 67, and 68 as though fully set forth herein.

70. This claim arises under the common law of the State of California relating to unfair competition.

71. Defendants' Infringing Plush incorporate matter constituting reproductions, copies and colorable imitations of Kellytoy's Squishmallow Trade Dress. Defendants' unauthorized use of Kellytoy's Squishmallow Trade Dress constitutes unfair competition, and is likely to cause confusion and mistake in the minds of the trade and the purchasing public as to the source of the parties' products and to cause purchasers to believe Defendants' products are authentic products of Kellytoy when in fact they are not.

72. Upon information and belief, Defendants have intentionally appropriated Kellytoy's Squishmallow Trade Dress with the intent of causing confusion, mistake, and deception as to the source of their goods and with the intent of palming off their goods as those of Kellytoy and to place others in the position to palm off their goods as those of Kellytoy. Defendants have thus committed unfair competition under the common law of the State of California.

73. By their actions in infringing Kellytoy's Squishmallow Trade Dress, Defendants are improperly trading upon the reputation and good will of Kellytoy and are impairing Kellytoy's valuable rights in its Squishmallow Trade Dress.

74. Upon information and belief, said activities of Defendants alleged herein were and are willful and intentional acts of unfair competition.

75. Kellytoy has no adequate remedy at law. Thus said activities of Defendants have caused, if not enjoined, will continue to cause irreparable harm and damage to the rights of Kellytoy in its Squishmallow Trade Dress and to its business

1 reputation and good will.

2 76. Upon information and belief, Defendants have engaged in their unlawful
3 conduct alleged herein intentionally, maliciously, fraudulently and oppressively
4 entitling Kellytoy to punitive damages in an amount to be determined at trial.

5 **FOURTH CAUSE OF ACTION**

6 **(California Statutory Unfair Competition –**
7 **California Bus. & Prof. Code § 17200, *et seq.*)**

8 (Against all Defendants)

9 77. Kellytoy repeats and re-alleges each and every allegation of paragraphs
10 1 through 61, 67 through 69, and 71 through 75, as though fully set forth herein.

11 78. By reason of the foregoing, Defendants have been, and are, engaged in
12 “unlawful, unfair or fraudulent business practices” in violation of California
13 Business and Professional Code Section 17200 *et seq.*

14 79. Kellytoy’s Squishmallows Trade Dress constitutes a protectable
15 property right, and the Defendants’ conduct – including without limitation their
16 infringement of the Squishmallows Trade Dress – will and has caused an
17 impairment and diminishment of that property right. Indeed, the activities of
18 Defendants have caused and, if not enjoined, will continue to cause irreparable harm
19 and damage to the rights of Kellytoy in its Squishmallow Trade Dress and to its
20 business reputation and good will. Kellytoy has no adequate remedy at law for
21 these wrongs and injuries. The damage to Kellytoy includes harm to its goodwill
22 and reputation in the marketplace that money cannot compensate. Accordingly,
23 Kellytoy is entitled to a preliminary and permanent injunction restraining and
24 enjoining Defendants’ and their agents, servants, and employees, and all persons
25 acting thereunder, in concert with, or on their behalf, from using Kellytoy’s
26 Squishmallow Trade Dress, or any colorable imitation or variation thereof, in
27 connection with the sale and/or marketing of any products. Kellytoy is further
28 entitled to restitutionary disgorgement of all of Defendants’ ill-gotten gains pursuant

1 to California Business and Professions Code § 17203 and to recover its costs and
2 attorneys' fees incurred in bringing and prosecuting this action.

3 **PRAYER FOR RELIEF**

4 WHEREFORE, Kellytoy prays for judgment against Defendants as follows:

- 5 1. That Defendants, their officers, members, directors, agents, servants,
6 employees, successors, licensees, representatives, successors, assigns, and all
7 persons acting in concert or participation with them, be permanently enjoined and
8 restrained from:
- 9 (i) Manufacturing, importing, distributing, advertising, offering to
10 sell or selling the Infringing Plush or any colorable imitations of
11 the Squishmallow Trade Dress;
 - 12 (ii) Using the Squishmallow Trade Dress or any confusingly similar
13 trade dress in connection with plush or other toys;
 - 14 (iii) Using the Squishmallow Trade Dress, or any confusingly similar
15 mark, in connection with the advertisement, offer to sell or sale of
16 any toy products;
 - 17 (iv) Using any false designation of origin, or representing or
18 suggesting directly or by implication that Defendants, or any
19 brands or other sources identifiers created by Defendants, or their
20 toys, are affiliated with, associated with, authorized by, or
21 otherwise connected to Kellytoy, or that Defendants are
22 authorized by Kellytoy to use the Squishmallow Trade Dress;
 - 23 (v) Engaging in any other activity constituting unfair competition with
24 Kellytoy, or constituting infringement of the Squishmallow Trade
25 Dress; and
 - 26 (vi) Assisting, aiding, or abetting any other person or business entity
27 in engaging or performing any of the activities referred to in
28 subparagraphs (i) through (v) above, or effecting any assignments

1 or transfers, forming new entities or associations, or utilizing any
2 other device for the purpose of circumventing or otherwise
3 avoiding the prohibitions set forth in subparagraphs (i) through
4 (v) above.

5 2. That Defendants be directed to file with the Court and serve on
6 Kellytoy, within thirty (30) days after entry of a final injunction, a report in writing
7 under oath setting forth in detail the manner and form in which Defendants have
8 complied with the injunction.

9 3. That the Court direct any third parties providing services to
10 Defendants in connection with any infringing and/or enjoined conduct, including
11 social media platforms (*e.g.*, Instagram, Facebook, Twitter), online marketplaces
12 (*e.g.*, Alibaba, eBay, Etsy, AliExpress, Amazon, Taobao), online payment
13 providers, including credit card companies (*e.g.*, PayPal, Visa) and other service
14 providers (*e.g.*, Google, GoDaddy, LiveChat, Shopify) to cease providing services
15 to Defendants in connection with the offer for sale and sale of the Infringing Plush
16 or any other products using or embodying the Squishmallow Trade Dress.

17 4. That Defendants be required to pay Kellytoy such damages as it has
18 sustained as a consequence of Defendants' infringement of the of the Squishmallow
19 Trade Dress and trebling of those damages under 15 U.S.C. § 1117;

20 5. Adjudge that each of the Defendants, by its unauthorized use of
21 Kellytoy's the Squishmallow Trade Dress for plush toys, and such other acts as it
22 may have undertaken relating to the Squishmallow Trade Dress, have violated
23 Kellytoy's rights under 15 U.S.C. § 1125(a), under California state law (including,
24 without limitation, Cal. Bus. & Prof. Code § 17200 *et seq.*), and under common law,
25 and that they have done so willfully and for the purpose of violating Kellytoy's
26 rights and damaging Kellytoy's goodwill and reputation in the Squishmallow Trade
27 Dress;

28 6. Direct Defendants to provide Kellytoy with an identification in writing

1 of any and all entities that are presently using the Squishmallow Trade Dress in the
2 United States on Defendants' behalf and inform them that they must immediately
3 cease such use;

4 7. Direct Defendants to immediately recall any and all merchandise
5 previously provided to any United States entity under the Squishmallow Trade
6 Dress;

7 8. Enter an order, pursuant to 15 U.S.C § 1118, directing Defendants to
8 deliver for destruction all products, brochures, marketing materials, decals, stickers,
9 signs, prints, packages, receptacles, wrappers, boxes, and advertisements in their
10 possession or under their control, bearing any unauthorized copy of any of the
11 Squishmallow Trade Dress, or any simulation, reproduction, counterfeit, copy,
12 confusingly similar likeness, or colorable imitation thereof, and all plates, molds,
13 matrices, programs and other means of making same;

14 9. That each Defendant provide Kellytoy in writing with the following
15 information relating to Defendants' goods marketed, advertised, offered for sale, or
16 sold under the Squishmallow Trade Dress:

- 17 (i) the name, address and telephone number of each and every
18 United States entity to whom Defendants have made available or
19 otherwise provided any such products; and
20 (ii) a full accounting as to the precise dollar amount of such products
21 made available or provided and the profits recognized by
22 Defendants in connection with such actions;

23 10. Direct Defendants to pay the costs of corrective advertising;

24 11. Direct Defendants to pay Plaintiff's attorneys' fees and costs incurred
25 in initiating and prosecuting this action;

26 12. Direct Defendants to pay punitive damages and exemplary damages
27 according to proof;

28 13. That Kellytoy recover its actual damages, Kellytoy's lost profits, and

1 Defendant's profits arising from Defendants' conduct complained-of herein;

2 14. That the Court award enhanced profits and treble damages;

3 15. That Kellytoy be awarded interest, including pre-judgment
4 interest, on the foregoing sums;

5 16. That the Court direct such other actions as the Court may deem just and
6 proper to prevent the public from deriving the mistaken impression that any
7 products or services offered, advertised, or promoted by or on behalf of Defendants
8 are authorized by Kellytoy or related in any way to Kellytoy's products or services;

9 17. That Defendants be ordered to disgorge all of their ill-gotten gains
10 pursuant to California Business and Professions Code § 17203; and

11 18. For such other and further relief as the Court may deem just and
12 proper.

13 Respectfully submitted,

14 DATED: December 20, 2019

FREEMAN, FREEMAN & SMILEY, LLP

15
16 By: /s/ Mark B. Mizrahi

17 TODD M. LANDER

18 MARK B. MIZRAHI

19 Attorneys for Plaintiff,

20 KELLYTOY WORLDWIDE, INC.
21
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23
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27
28

DEMAND FOR JURY TRIAL

Plaintiff hereby demands and requests a trial by jury of all issues raised that are triable by jury.

Respectfully submitted,

DATED: December 20, 2019

FREEMAN, FREEMAN & SMILEY, LLP

By: /s/ Mark B. Mizrahi

TODD M. LANDER

MARK B. MIZRAHI

Attorneys for Plaintiff,

KELLYTOY WORLDWIDE, INC.

EXHIBIT N

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

BUILD-A-BEAR WORKSHOP, INC,)	
)	
Plaintiff,)	
)	
vs.)	Case No.
)	
KELLY TOYS HOLDINGS, LLC,)	
KELLY AMUSEMENT HOLDINGS, LLC,)	
JAZWARES, LLC, and JAZPLUS, LLC.)	JURY TRIAL DEMANDED
)	
Defendants.)	

COMPLAINT FOR DECLARATORY JUDGMENT

Plaintiff Build-A-Bear Workshop, Inc. (“Plaintiff” or “Build-A-Bear”) brings this declaratory judgment action against Kelly Toys Holdings, LLC (“Kelly Toys”), Kelly Amusement Holdings, LLC (“Kelly Amusement”), Jazwares, LLC (“Jazwares”), and Jazplus, LLC (“Jazplus”) (collectively “Defendants”) pursuant to Rule 57 of the Federal Rules of Civil Procedure and 28 U.S.C. § 2201, and alleges as follows:

NATURE OF THE CASE

1. This is a declaratory judgment action seeking a ruling that: (a) Defendants’ claimed trade dress rights in their Squishmallows products are invalid, unenforceable, and unprotectable under the Lanham Act, 15 U.S.C. §§ 1051 *et seq.*; and (b) Build-A-Bear’s SKOOSHERZ™ plush toys do not infringe any of Defendants’ claimed trade dress rights in their Squishmallows products under the Lanham Act, 15 U.S.C. §§ 1051 *et seq.*

PARTIES, JURISDICTION, AND VENUE

2. Plaintiff Build-A-Bear is a Delaware corporation with its principal place of business located at 415 South 18th Street, St. Louis, Missouri 63103.

3. Upon information and belief, Defendant Kelly Toys is a Delaware limited liability company with its principal place of business located at 4811 South Alameda Street, Los Angeles, California 90058.

4. Upon information and belief, Defendant Kelly Amusement is a Delaware limited liability company with its principal place of business located at 350 Michael Drive, Syosset, New York 11791.

5. Upon information and belief, Defendant Jazwares is a Delaware limited liability company with its principal place of business located at 1067 Shotgun Road, Sunrise, Florida 33326.

6. Upon information and belief, Defendant Jazplus is a Delaware limited liability company with its principal place of business located at 7284 West Palmetto Park Road, Boca Raton, Florida 33433.

7. Defendants assert that they are either affiliated entities, governed by common ownership and/or intercompany agreements, or otherwise have the right to sell or otherwise distribute Squishmallows products.

8. This action arises under the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, and the Lanham Act, 15 U.S.C. § 1051 *et seq.*

9. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1338.

10. This Court has personal jurisdiction over Defendants because Defendants performed acts within the Eastern District of Missouri subjecting Defendants to the laws of this District, including entering into contracts and transacting business in this District. Among other things, Defendants' Squishmallows products with their claimed trade dress are available for

purchase in physical retail stores in this District, including but not limited to: Target stores in the City of St. Louis, Kirkwood, Town and Country, and Cape Girardeau, Missouri; Walgreens stores in the City of St. Louis, Kirkwood, Des Peres, and Cape Girardeau, Missouri; and Walmart stores in the City of St. Louis, Kirkwood, Maplewood, and Cape Girardeau, Missouri. Additionally, Defendants' Squishmallows products are available for order online through Defendant Jazware's website at <https://shop.jazwares.com/pages/squishmallows> and on <https://www.Amazon.com> for delivery to physical addresses and customers in this District. In order to sell Squishmallows products in and to these Missouri locations, the Squishmallows products with the claimed trade dress were shipped to Missouri by one or more Defendants or their agents.

11. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b) and (c) in that a substantial part of the events or omissions giving rise to the claim occurred in this District, Defendants' Squishmallows products with the claimed trade dress are sold in competition with Build-A-Bear's SKOOSHERZTM plush toys in this District, Build-A-Bear's SKOOSHERZTM plush toys were designed and conceived of in this District, and Defendants can otherwise be found in this District by virtue of the acts identified above.

12. There is an actual, ripe, and justiciable controversy between Build-A-Bear and Defendants concerning whether Defendants have valid and enforceable trade dress rights under the Lanham Act in their Squishmallows products and whether Plaintiff Build-A-Bear's SKOOSHERZTM plush toys infringe any trade dress rights associated with Defendants' Squishmallows products under the Lanham Act. One or more Defendants have previously or are currently asserting trade dress rights in their Squishmallows products under the Lanham Act against multiple manufacturers and sellers of plush toys, including Ty, Inc., Dan-Dee International, and Zuru, LLC, among others. Additionally, Defendants sued Build-A-Bear on January 29, 2024,

in the 17th Judicial District Circuit Court for Broward County, Florida (*Jazwares, LLC, et al. v. Build-A-Bear Workshop, Inc.*, Case No. CACE-24-001221), attempting to assert Florida state law claims of trade dress infringement and unfair competition relating to Build-A-Bear's SKOOSHERZTM plush toys. Also on January 29, 2024, Defendants filed an *ex parte* emergency motion for preliminary injunction, in which Defendants asserted injuries purportedly occurring across the country and not limited or specific to Florida (which motion was subsequently denied by the Broward County, Florida court later in the day).

FACTS RELATING TO BUILD-A-BEAR AND ITS SKOOSHERZTM PLUSH TOYS

13. Founded in 1997, Build-A-Bear is a multi-generational global brand focused on its mission to “add a little more heart to life” appealing to a wide array of consumer groups who enjoy the personal expression in making their own “furry friends” to celebrate and commemorate life moments.

14. Build-A-Bear currently has nearly 500 interactive brick-and mortar experience locations across the country and around the world, where a variety of formats provide guests of all ages a hands-on entertaining experience and foster a lasting and emotional brand connection.

15. Build-A-Bear also offers engaging e-commerce/digital purchasing experiences on www.buildabear.com including its online “Bear-Builder”, the animated “Bear Builder 3D Workshop” and its age-gated, adult-focused “Bear Cave”.

16. Although Build-A-Bear started with consumers building their own stuffed plush toys, for many years Build-A-Bear has also sold pre-stuffed plush toys in its retail stores and online at www.buildabear.com and its Build-A-Bear store on Amazon.com.

17. From humble beginnings and a single retail store in St. Louis, Missouri, Build-A-Bear has emerged as one of the world's leaders in high-quality plush toys, innovative store experiences, and engaging, family-friendly entertainment.

18. In January 2024, and in anticipation of Valentine’s Day celebrations, Build-A-Bear introduced on a global basis its new line of collectible plush friends – SKOOSHERZ™ – uniquely styled for optimal hugging benefits. Displaying a trademarked, unique name evoking their huggability, the adorable SKOOSHERZ™ spherical plush friends are made with an ultra-soft plush and stuffing perfect for hugging.

19. Build-A-Bear's first five SKOOSHERZ™ plush toys are all based on original, popular Build-A-Bear plush animals, including:



Build-A-Bear's **SKOOSHERZ**™ Pink Axolotl



Build-A-Bear's **SKOOSHERZ™** Strawberry Cow



Build-A-Bear's **SKOOSHERZ™** Spring Green Frog



Build-A-Bear's **SKOOSHERZ™** Rainbow Sparkles Teddy Bear



Build-A-Bear's **SKOOSHERZ™** Red Raptor

20. Build-A-Bear's **SKOOSHERZ™** plush toys are distinctly round or spherical in shape, with bright coloring and features matching Build-A-Bear's original, full animal designs (which it continues to sell).

21. Shown below is a visual comparison of Build-A-Bear's current SKOOSHERZ™ plush toys to its original plush animals on which the SKOOSHERZ™ plush toys are based.



Build-A-Bear's **SKOOSHERZ™**
Pink Axolotl



Build-A-Bear's Original Pink Axolotl



Build-A-Bear's **SKOOSHERZ™** Strawberry Cow



Build-A-Bear's Original Strawberry Cow



Build-A-Bear's **SKOOSHERZ™** Spring Green Frog



Build-A-Bear's Original Spring Green Frog



Build-A-Bear's **SKOOSHERZ™**
Rainbow Sparkle Teddy Bear



Build-A-Bear's Original
Rainbow Sparkle Teddy Bear



Build-A-Bear's **SKOOSHERZ™**
Red Raptor



Build-A-Bear's Original
Red Raptor

22. Each SKOOSHERZ™ plush toy not only has labels and/or hang tags depicting Build-A-Bear's long-standing common law and federally registered Build-A-Bear Workshop® name and logo (shown below), but every SKOOSHERZ™ plush toy also has right and left arms, with one arm bearing Build-A-Bear's common law, federally registered, and iconic BAB® heart-shaped paw pad logo (also shown below).



23. Build-A-Bear's advertising and marketing of its new SKOOSHERZ™ plush toys consistently and prominently include references to Build-A-Bear as the sole and exclusive source

of the SKOOSHERZ™ plush toys. This includes references to the Build-A-Bear name, the Build-A-Bear Workshop logo, the BAB logo, and other brand indicators on the products, on its website at www.buildabear.com, and in product displays in its physical retail locations, as shown by example below:



24. Currently, Build-A-Bear's SKOOSHERZTM plush toys can only be purchased in a Build-A-Bear physical retail store or online through Build-A-Bear's website at www.buildabear.com or the Build-A-Bear store on Amazon.com and are not available for purchase in third-party stores, such as Walgreen's, Walmart, or Target.

FACTS RELATING TO KELLY TOYS' SQUISHMALLOWS PRODUCTS

25. Defendants claim to be the sole and exclusive owners of claimed trade dress rights in their Squishmallows product line.

26. Defendants' descriptions of the features purportedly comprising their claimed trade dress have changed greatly over the years and as applied to various third parties accused by Defendants of trade dress infringement. Moreover, none of those purported features are consistently used by Defendants as an identifier of source, but instead constitute a mere product design aimed to aesthetically appeal to consumers.

27. Over time, Defendants and apparently related entities have asserted at least twelve (12) different descriptions of the combined features purportedly make up their claimed trade dress in the Squishmallows product line, including the following descriptions and the respective cases where such assertions were made (With varying descriptions sometimes found even within the same pleadings!):

- (1) *Kellytoy USA, Inc., et al. v. Dan-Dee Int'l, Ltd., et al.*, Case No. 2:18-cv-05399 (C.D. Cal.), at ECF No. 16, First Amended Complaint (filed Aug. 24, 2018), ¶23:
 - a. substantially bell-shaped plush toys embodying fanciful renditions of animals/characters
 - b. embroidered anime-inspired minimalist, whimsical facial features
 - c. a velvety velour-like textured exterior, and
 - d. stuffing with a light "marshmallow," memory foam-like texture
- (2) *Kellytoy Worldwide, Inc., et al. v. Ty, Inc., et al.*, Case No. 1:20-cv-00748 (N.D. Ill.), at ECF No. 21, Memorandum in Support of Motion for Preliminary Injunction (filed Feb. 21, 2020), p. 3:

- a. specific egg/bell shape (including the lack of a discrete head and torso) lacking proportionate, pronounced limbs
 - b. abstract, embroidered facial features based on the Japanese Kawaii style
 - c. oval/rounded graphic features
 - d. ultra-soft shell and mooshy, silky stuffing

- (3) *Kellytoy Worldwide, Inc., et al. v. Ty, Inc., et al.*, Case No. 1:20-cv-00748 (N.D. Ill.), at ECF No. 24, Declaration of Jeanne Yoon in Support of Kelly Toys' Motion for Preliminary Injunction (filed Feb. 21, 2020), ¶10
 - a. The specific shape (including the lack of a discrete head and torso) lacking proportionate, pronounced limbs
 - b. Kawaii abstract, embroidered facial features
 - c. Oval/rounded graphic features
 - d. An ultra-soft shell and mooshy, silky stuffing

- (4) *Kellytoy Worldwide, Inc., et al. v. Ty, Inc., et al.*, Case No. 1:20-cv-00748 (N.D. Ill.), at ECF No. 24, Declaration of Jeanne Yoon in Support of Kelly Toys' Motion for Preliminary Injunction (filed Feb. 21, 2020), ¶28:
 - a. egg/bell-like shape
 - b. absence of proportionate/pronounced limbs
 - c. simplified Kawaii-inspired aesthetics
 - d. short pile silky shell
 - e. airy, silky stuffing

- (5) *Kellytoy Worldwide, Inc., et al. v. Ty, Inc., et al.*, Case No. 1:20-cv-00748 (N.D. Ill.), at ECF No. 69, First Amended Complaint (filed May 21, 2020), ¶32:
 - a. Substantially egg/bell shaped plush toys depicting various similarly shaped fanciful renditions of animals/characters
 - b. Simplified Asian style Kawaii faces with repeating and complementary rounded/oval shaped graphics depicting features on the characters themselves (such as eyes, snouts and bellies) and which conform to and support the overall egg/bell shape of the toys
 - c. Embroidered facial features, such [as] nostrils, and/or mouths
 - d. Distinctive contrasting and non-monochrome coloring
 - e. Short-pile velvety velour-like textured exterior with a light and silky memory foam-like stuffing providing an extremely soft and squeezable marshmallow feel

- (6) *Kellytoy Worldwide, Inc., et al. v. Ty, Inc., et al.*, Case No. 1:20-cv-00748 (N.D. Ill.), at ECF No. 105, Second Amended Complaint (filed Oct. 21, 2020), ¶34:

- a. Substantially egg/bell shaped plush toys depicting various similarly shaped fanciful renditions of animals/characters
 - b. Simplified Asian style Kawaii faces with repeating and complementary rounded/oval shaped graphics depicting features on the characters themselves (such as eyes, snouts and bellies) and which conform to and support the overall egg/bell shape of the toys
 - c. Embroidered facial features, such as nostrils, eyes and/or mouths
 - d. Distinctive contrasting and non-monochrome coloring
 - e. Short-pile velvety velour-like textured exterior with a light and silky memory foam-like stuffing providing an extremely soft and squeezable marshmallow feel
- (7) *Kelly Toys Holdings, LLC, et al v. Zuru, LLC*, Case No. 2:23-cv-09255 (C.D. Cal.), at ECF No. 1, Complaint (filed Nov. 2, 2023), ¶3:
- a. Shaped fanciful renditions of animals/characters
 - b. Simplified Asian style Kawaii faces
 - c. Embroidered facial features
 - d. Distinctive and non-monochrome coloring
 - e. Velvety velour-like textured exterior
- (8) *Kelly Toys Holdings, LLC, et al v. Zuru, LLC*, Case No. 2:23-cv-09255 (C.D. Cal.), at ECF No. 26-2, Exhibit A to Jazplus Opposition to Motion to Dismiss (filed Jan. 22, 2024), ¶23:
- a. substantially egg/bell shaped plush toys depicting various similarly shaped fanciful renditions of animals/characters
 - b. simplified Asian style Kawaii faces with repeating and complementary rounded/oval shaped graphics depicting features on the characters themselves (such as eyes, snouts and bellies) and which conform to and support the overall egg/bell shape of the toys
 - c. embroidered two-dimensional facial features, such as eyes, nostrils, mouths
 - d. distinctive contrasting and non-monochrome coloring
 - e. short-pile velvety velour-like textured exterior with a light and silky memory foam-like stuffing providing an extremely soft and squeezable marshmallow feel
- (9) *Kelly Toys Holdings, LLC, et al v. Zuru, LLC*, Case No. 2:23-cv-09255 (C.D. Cal.), at ECF No. 26, Jazplus Opposition to Motion to Dismiss (filed Jan. 22, 2024), p. 1:
- a. fanciful rendition of a unique animal with simplified Asian style Kawaii faces in an egg/bell shape in combination with other features that create a distinguishing aesthetic look

- (10) *Jazwares, LLC., et al. v. Build-A-Bear Workshop, Inc.*, Case No. CACE-24-001221 (Florida 17th Cir. Ct.), at Emergency Motion for Temporary Injunction (filed Jan. 29, 2024), p. 4:
- a. Substantially egg/bell shaped plush toys depicting various similarly shaped fanciful renditions of animals/characters
 - b. simplified Asian style Kawaii faces with repeating and complementary rounded/oval shaped graphics depicting features on the characters themselves (such as eyes, snouts and bellies) and which conform to and support the overall egg/bell shape of the toys
 - c. embroidered facial features, such as eyes, nostrils, and/or mouths
 - d. distinctive contrasting non-monochrome coloring
 - e. short-pile exterior
- (11) *Jazwares, LLC., et al. v. Build-A-Bear Workshop, Inc.*, Case No. CACE-24-001221 (Florida 17th Cir. Ct.), at Emergency Motion for Temporary Injunction (filed Jan. 29, 2024), p. 7:
- a. Shaped fanciful renditions of animals/characters
 - b. simplified Asian style Kawaii faces
 - c. embroidered facial features
 - d. distinctive and non-monochrome coloring
 - e. short-pile exterior
- (12) *Jazwares, LLC., et al. v. Build-A-Bear Workshop, Inc.*, Case No. CACE-24-001221 (Florida 17th Cir. Ct.), at Emergency Motion for Temporary Injunction (filed Jan. 29, 2024), p. 25:
- a. Asian-style Kawaii faces
 - b. Rounded shape
 - c. embroidered facial features
 - d. bright colors
 - e. small facial features
 - f. small appendages
 - g. overall unique minimalistic depiction of cute animals and shapes

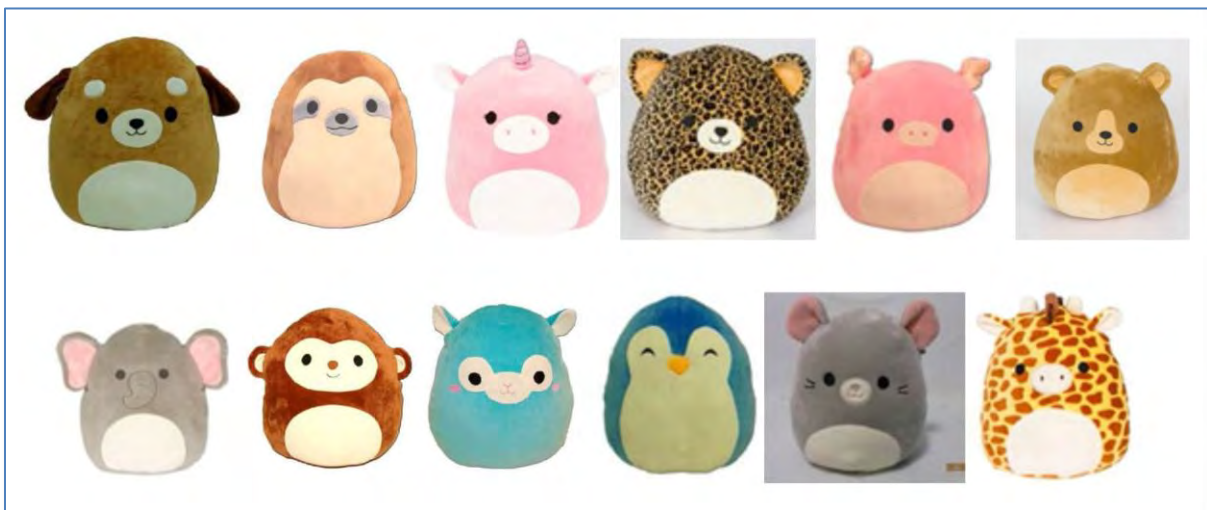
(any and all combinations of the foregoing are hereinafter referred to as the “Claimed Squishmallows Trade Dress”).

28. Most recently, Defendants have asserted infringement of trade dress descriptions

(10) – (12) by Build-A-Bear in Florida state court under Florida common law, but Defendants’

litigation history against third parties suggests that Defendants will likely also claim features found in descriptions (1) – (9) but not found in descriptions (10) – (12), to be identifiers of source for purposes of the Claimed Squishmallows Trade Dress vis-à-vis Build-A-Bear. For these reasons and others set forth herein, Build-A-Bear is seeking declarations of invalidity, unenforceability, and non-infringement under the Lanham Act, 15 U.S.C. §§ 1051 *et seq.*, for all features of the Claimed Squishmallows Trade Dress.

29. The various features Defendants have claimed as components of the Claimed Squishmallows Trade Dress are not all consistently present throughout the entire Squishmallows product line, undermining the assertion of a total product image recognizable by the consuming public as an identifier of a single source. Defendants contend that their various claimed trade dress features are not easily reduced to writing and that the overall look and image of the Claimed Squishmallows Trade Dress are not limited to specific shapes, colors, textures and graphics. In fact, Defendants and apparently related entities have previously filed complaints alleging trade dress infringement that included images of the wide variety of Squishmallows products and designs, which images do not consistently display any total product image or commercial impression, such as the following:





30. No consistent overall look and feel or stable visual appearance can be discerned from Defendants' Squishmallows products. For example, the snouts are all different (*e.g.*, circular, oval, triangular, and "comma" shaped), with some containing a nose attached to a curved mouth (*e.g.*, dog, leopard, bear, sheep and mouse), one containing a nose and a separate mouth (*e.g.*, sloth), some containing nostrils only (*e.g.*, unicorn, pig, frog, and giraffe), one with lines to resemble an elephant trunk, and some toys lacking a snout altogether (*e.g.*, penguin, which has a beak, and monkey). One cannot discern distinctive contrasting and non-monochrome coloring in the depicted toys, which run the gamut from various shades of black, brown, tan, white, pink, blue and gray, and including colors and prints found in nature, such as black for the bat, brown for the dog, sloth, bear and monkey, green for the frog, pink for the pig, grey for the mouse and elephant, and leopard and giraffe prints for the corresponding animals. Even the embroidered, Asian style

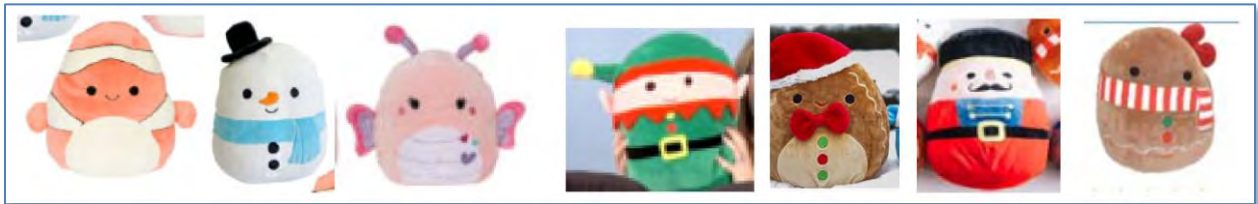
eyes have no discernible consistency: some eyes have eyelashes (*e.g.*, pink unicorn), some are placed on contrasting fabric bands or face masks (*e.g.*, sloth, monkey and blue sheep), and some even have “closed” eyes (*e.g.*, penguin and blue dog). Some of the toys have contrasting, semi-circular “bellies” whereas others do not, and some have a contrasting irregularly-shaped panel covering the face and belly of the toy (sloth and penguin). The various “appendages” also differ between the toys depicted above, with horns, manes, and differently shaped ears placed on different parts of the toys (floppy, round, folded, not folded, elephant-shaped, or no ears at all).

31. Additional examples of Squishmallows purportedly featuring Defendants’ claimed trade dress have been submitted in other cases, and further demonstrate that the Claimed Squishmallows Trade Dress features are not consistently found in every Squishmallows product and accordingly do not create a commercial impression of a single source. For example, not all Squishmallows have “short-pile” fabric or “velvety velour-like textured exterior” because some are made with longer pile fabric (lion’s mane and bird’s feathers) and some are made with scratchy sequined fabric:



32. All of Defendants’ Squishmallows products do not have “rounded/oval shaped graphics depicting features of the characters themselves (such as eyes, snouts and bellies) and which conform to and support the overall egg/bell shape of the toys”. Instead, Defendants’ Squishmallows products have all manner of features and graphics that are linear (snowman and

gingerbread man scarf, mummy tape, elf and nutcracker belts, butterfly belly, witch's bodice), squiggled (clownfish lines, gingerbread man trim and unicorn hair), triangular (elf's collar, pumpkin eyes, and dinosaur mane), or pointed (fox facial features), while others have details not "kawaii" in style (nutcracker, jack-o-lantern, witch):



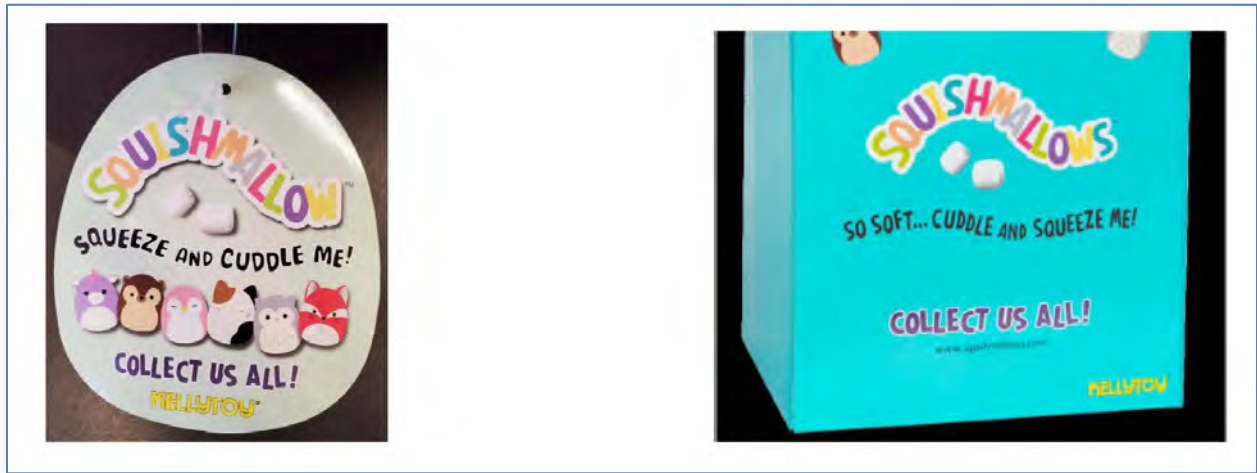
33. Defendants' ever-changing claimed trade dress features are essential to the use or purpose of plush products and affect the cost or quality of the products. If Defendants were granted the exclusive use of any or all of the Claimed Squishmallows Trade Dress used in any combination and/or variation, their competitors would be put at a significant non-reputation-related disadvantage with regard to generic, functional, and non-source identifying features. Moreover, the claimed trade dress features constitute the actual benefit that the consumer wishes to purchase, as distinguished from an assurance that a particular entity made, sponsored, or endorsed a product.

34. The main messages communicated by Defendants' advertising for its Squishmallows product line are softness/squeezability – and collectability. Defendants also frequently advertise that their Squishmallows can be used as pillows, which message is mentioned in dozens of marketing materials for the products, demonstrating the functionality of the products. Advertising for Defendants' Squishmallows has touted the fact that “[s]ince 2017, the Squishmallows ... have offered comfort, support and warmth as ... pillow pals” and Kelly Toys' CEO Jonathan Kelly has also declared that Squishmallows can be used as pillows (among other things) in a news release about the toy: “Squishy and comforting, they are great ... pillows.” Because Squishmallows function as pillows, those aspects of the products that render them useful as pillows are functional. The functional “pillow” features of Squishmallows include, at least, the egg/bell shape, the embroidered facial features (hard or plastic features can be too uncomfortable for a pillow), the short-pile, ultra-soft, velvety velour-like textured exterior, and the light and silky memory foam-like stuffing providing an extremely soft and squeezable marshmallow feel.

35. These same elements have been advertised by Defendants as being washable – another functional feature, including in exhibits to Defendants' own complaints against alleged third party infringers, including advertising about the Squishmallows products stating that “the unique line is made of super soft spandex EF and polyester stuffing, similar to memory foam, for crazy, cuddly fun. Caring for Squishmallows is easy: give them lots of love, wash in warm water and tumble dry on medium heat.”

36. Defendants also advertise the fact that Squishmallows serve the function of offering comfort and “helping to relieve stress and anxiety.” These claims, along with statements about the tactile appeal of the toys and how the products assist those with sensory issues, have been repeated in numerous marketing materials for the products.

37. Tags, packages, displays and advertisements for Defendants' Squishmallows products tout the functionality of the fact that the toys are "soft", "squishable" and "huggable," with slogans like "SQUEEZE AND CUDDLE ME":



38. Upon information and belief, Defendants do not own any trademark registrations or exclusive, common law trademark rights to the terms "SQUISH", "SQUISHY", "SQUISHABLE", or "HUGGABLE" in connection with plush toys.

39. If each aspect of the claimed trade dress were in fact protected trade dress, it would be virtually impossible for competitors to create alternative designs. For example, Defendants claim as trade dress those elements of its plush products that make the product resemble an animal, including "eyes, snouts and bellies" and "nostrils, and/or mouths." However, features like eyes, nostrils, ears, and noses are essential to the purpose of creating animal or character figures and are, therefore, functional. Indeed, many of the asserted elements that are necessary to make Squishmallows resemble their counterparts in nature or a fanciful character (such as eyes, ears, snouts, bellies, nostrils, mouths, coloring, etc.) are functional, and therefore cannot be protectable trade dress.

40. Defendants' claimed "distinctive contrasting non-monochrome coloring" is also functional. Fanciful coloring of toy and the overall design of plush toys is aesthetically functional in that it is the toys' aesthetic that drives the consumer to purchase them, and this functionality exists independently of any source-identifying function.

41. If features such as an egg/bell shape, Asian style Kawaii faces with rounded/oval shaped graphics, embroidered facial features, distinctive contrasting non-monochrome coloring, or short-pile fabric exterior were protected trade dress, it would be virtually impossible for competitors to create alternative toy designs for this item's purpose. From a toy designer's perspective, each of these claimed trade dress features is necessary to either depict the various characters or animals, or is necessary to create this category of pillow-type plush that is currently trending.

**NUMEROUS SQUISHY PLUSH TOYS EXISTED BEFORE
SQUISHMALLOWS ENTERED THE MARKETPLACE IN 2017**

42. Long before Defendants introduced their Squishmallows product line allegedly featuring the claimed trade dress in 2017, third parties offered for sale and sold (and continue to sell) across the United States a number of products featuring all of the elements of Defendants' claimed trade dress, including but not limited to Squishable's plush animal line starting in 2008, Ty's 2011 and 2012 BEANIE BALLZ, Ty's 2013 BABY BALLZ, and KidRobot's Yummy World products starting in 2015:



Ty's Baby Ballz, 2013



Ty Pickles, 2011



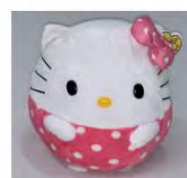
Ty Flash, 2011



Ty Bonsai, 2011



Ty Tumbles, 2011



Ty Hello Kitty, 2012



43. Long before Defendants introduced their Squishmallows product line featuring the claimed trade dress, each of the claimed trade dress elements, either alone or combined, was prevalent in the U.S. toy market and offered for sale and sold by third parties in interstate commerce. Many of such toys (or variations thereof) are still sold today, including for example:



44. Moreover, Defendants or related entities have dismissed their complaints against multiple major competitors and their plush products with the claimed trade dress elements, either alone or combined, including but not limited to Ty and its Squishaboos (or Squishy Beanies) plush products and Dan-Dee International and its Squishy plush products. After such lawsuits were dismissed with prejudice, neither Ty nor Dan-Dee publicly identify that their use is licensed by or affiliated with Defendants in any manner. Therefore, the product features of these third parties (previously alleged to infringe Defendants' claimed trade dress) do not and cannot identify Defendants as the sole and exclusive source of such trade dress elements, either alone or in combination.

45. In other words, Defendants have, by their own actions, permitted major third-party competitors like Ty and Dan-Dee to use, without any attribution to Defendants, the same trade dress features that Defendants now claim Build-A-Bear infringes. Defendants are thereby prevented from acquiring any distinctiveness or secondary meaning in Defendants' Claimed Squishmallows Trade Dress due to a crowded field of products utilizing the very same features Defendants currently claim as trade dress. Defendants' repeated dismissals with prejudice amounts to admissions that Defendants' claimed rights cannot extend to those products or any others with a similar appearance. Examples of Ty's current Squishy Beanies and Dan-Dee's current Squishy plush toy are respectively shown below:

Ty's Squishy Beanies



Dan-Dee's Squishy plush toy



46. Because third parties have been selling their squishy plush products as identified above before 2017 and for many years thereafter, consumers do not identify any features of the Claimed Squishmallows Trade Dress exclusively with Defendants as the sole source. Moreover, Defendants' marketing activities and associated expenditures have not established secondary meaning in any trade dress asserted in the Squishmallows product line, because the advertising did not encourage consumers to identify the claimed trade dress solely and exclusively with Defendants. Indeed, Defendants' own advertising of its product line as the "Original" Squishmallows implicitly acknowledges that there are many other products with similar aesthetic and functional features.

47. Any commercial success of the Squishmallows product line is attributable to the desirability of the product configuration and functionality rather than the source-designating capacity of the claimed trade dress.

**BUILD-A-BEAR'S SKOOSHERZ™ PLUSH TOYS ARE EASILY DISTINGUISHED
FROM DEFENDANTS' SQUISHMALLOWS PRODUCTS**

48. Soft, pillow-like squishie-type products have been trending in the toy industry for a number of years. Build-A-Bear's SKOOSHERZ™ plush toys are simply the most recent example of pillow-type products in this space, including Squishables, Dan-Dee's Squishy toys,

Ty's Squishaboos, and toys made by Gund, Fiesta, First and Main, Rhode Island Novelty, Moosh, and others, all predating and/or sold contemporaneously in interstate commerce with Defendants' Squishmallows products such that Defendants cannot have acquired any distinctiveness or secondary meaning in the marketplace.

49. As described above, Build-A-Bear's SKOOSHERZ™ plush toys were not copied from Defendants' Squishables but are based upon, and derive from, preexisting Build-A-Bear toys which have been sold for a number of years. Moreover, Build-A-Bear's SKOOSHERZ™ plush toys demonstrate functional revisions (in a pillow-like presentation) to its preexisting Build-A-Bear toys, creating a consistent product offering by Build-A-Bear, and not copied or derived from any source-identifying feature purportedly in Defendants' Squishmallows products. The features present in each of Build-A-Bear's SKOOSHERZ™ plush toys including, for example, the coloration, fabric patterns, facial features, and ear shape and placement come directly from Build-A-Bear's preexisting plush animal products of the same name and design:



Build-A-Bear's **SKOOSHERZ™**
Pink Axolotl



Build-A-Bear's Original
Pink Axolotl



Build-A-Bear's **SKOOSHERZ™**
Red Raptor



Build-A-Bear's Original
Red Raptor

50. The design features on Build-A-Bear's SKOOSHERZ™ plush toys come from Build-A-Bear, not Defendants.

51. There is no confusing similarity between Build-A-Bear's SKOOSHERZ™ plush toys and Defendants' claimed trade dress. In terms of overall appearance of the products, Build-A-Bear's SKOOSHERZ™ are distinctly spherical or rounded in shape, in contrast to the claimed egg/bell-shaped design of Defendants' Squishmallows product line. Build-A-Bear's facial features match their preexisting designs and do not mimic Defendants' facial features, including eyes and mouth features that are specifically distinguished in terms of shape (for example, round eyes vs. oval or moon-shaped eyes). The coloration of Build-A-Bear's products functionally matches the specific animal depicted, including the distinctive yellow colored belly in its original Build-A-Bear "raptor" design and which is a functionally accurate part of this dinosaur depiction. The parties' respective source-identifying labels and tags are prominently displayed on their respective toys as well. A visual contrast of Build-A-Bear's SKOOSHERZ™ plush toys and Defendants' Squishmallows products is shown below:



Defendants' Archie the Pink Axolotl
Squishmallow



Build-A-Bear's **SKOOSHERZ™**
Pink Axolotl



Defendants' Evangelica Cow
Squishmallow



Build-A-Bear's **SKOOSHERZ™**
Strawberry Cow



Defendants' Wendy Green Frog
Squishmallow



Build-A-Bear's **SKOOSHERZ™**
Spring Green Frog

A plush toy bear with a body covered in horizontal rainbow stripes. It has a white snout with a pink nose and a small pink mouth. Its eyes are large and black. The bear has small, rounded ears with pink and white details. It is sitting on a plain white background.

A red, round plush toy with a smiling face, black eyes, and a white belly with a snowflake design. It has a small brown stem at the top and a tag on the right side.

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trademarks, and to the extent the consuming public identifies the source of Defendants' products, it does so by such registered trademarks, and not the overall shape, size, or commercial appearance of any of Defendants' products. Indeed, Defendants have not even attempted to register trade dress at the federal level in any of their Claimed Squishmallows Trade Dress designs, presumably because they know the U.S. Trademark Office would not approve of Defendants' shifting, vague, and overbroad descriptions of their purported trade dress, and because Defendants know they cannot prove acquired distinctiveness, secondary meaning, and/or sole and exclusive rights to their Claimed Squishmallows Trade Dress.

54. Although Defendants want their amorphous trade dress definition to include the entirety of a vast, varied product line, the Squishmallows product line lacks any common features, so Defendants cannot register it. Some Squishmallows are animals, some are not. Some have round eyes, some have slits. Some have mouths, some do not. Some have arms or feet, some do not. Some have bellies, some do not. Some have ears, some do not. Some wear clothes, some do not. Some have noses or snouts, some do not. Some have eyes on the tops of their heads, some do not. Defendants' Squishmallows have no consistent colors or color patterns. Because of this utter lack of consistency, Defendants would not be able to submit a single drawing of the claimed trade dress that could possibly satisfy the U.S. Trademark Office's regulatory requirements for providing notice to the public of Defendants' claimed rights. Even if one found the oval/egg-shaped perimeter to be consistent across the product lineup (which it is not), that would not help Defendants because they cannot register trade dress rights in an oval.

55. In other words, Defendants have avoided any attempt at federal registration of their claimed trade dress because Defendants do not own a single trade dress encompassing all Squishmallows and therefore cannot properly assert trade dress claims against Build-A-Bear.

56. Additionally, consumers are not likely to be confused between the source of the Build-A-Bear SKOOSHERZTM plush toys compared to Defendants' Squishmallows products. Adults, as purchasers of the Build-A-Bear SKOOSHERZTM plush toys, are likely to exercise reasonable care when purchasing the parties' respective plush products and can easily distinguish the sources of the parties' products, which, among other things, are clearly and prominently labeled with the parties' names and trademarks.

57. By selling its SKOOSHERZTM plush toys, Build-A-Bear does not seek to confuse any consumer as to the source of its products, and there is in fact no actual confusion. Each of Build-A-Bear's SKOOSHERZTM plush toys is sold in connection with its source-identifying SKOOSHERZTM trademark and its famous Build-A-Bear name and logo that clearly and prominently identifies Build-A-Bear as the source of the products, including on the product hang tag, the product label, and even with its iconic "BAB" heart paw logo on the arm of each Build-A-Bear SKOOSHERZTM plush toy.

58. The advertising and marketing of Build-A-Bear's SKOOSHERZTM plush toys always includes references to Build-A-Bear as the sole and exclusive source, including on its website at www.buildabear.com and in product displays in its physical retail locations. Moreover, Build-A-Bear's SKOOSHERZTM plush toys can only be currently purchased in a Build-A-Bear physical retail store or online through Build-A-Bear's website at www.buildabear.com and the Build-A-Bear store on Amazon.com and are not available for purchase in third-party stores like Walgreen's, Walmart, or Target.

59. This clarity of labeling in packaging, advertising, and sale avoids any likelihood of consumer confusion as to source stemming from the product's configuration, even if any features

of the Claimed Squishmallows Trade Dress could be deemed valid and enforceable against any features of Build-A-Bear's SKOOSHERZ™ plush toys.

**COUNT I – DECLARATORY JUDGMENT OF INVALIDITY AND
UNENFORCEABILITY OF THE CLAIMED SQUISHMALLOWS TRADE DRESS**

60. Build-A-Bear incorporates by reference Paragraphs 1 through 59 as if fully set forth herein.

61. Defendants have a history of litigious conduct, wherein Defendants have previously asserted in multiple cases against multiple third parties that Defendants have valid and enforceable trade dress in their Squishmallows product line under the Lanham Act.

62. Further, Defendants have previously asserted in multiple cases against multiple third parties that those third parties' manufacture, advertising and sale of plush toys infringe Defendants' claimed trade dress rights in their Squishmallows product line.

63. In particular, Defendants and related entities have filed at least thirty-three (33) federal district court lawsuits regarding Defendants' Squishmallows products against hundreds of defendants under the Lanham Act, 15 U.S.C. §§ 1051 *et seq.*, and/or other federal and common law claims. Those 33 federal lawsuits have been filed over the course of the last seven (7) years in the United States District Courts for the Southern District of New York, the Northern District of Illinois, and the Central District of California. Defendants have continued filing such federal Lanham Act infringement lawsuits regarding Defendants' Squishmallows products in just the past few months, including filing a Lanham Act trade dress infringement lawsuit against Zuru, LLC, in the Central District of California on November 2, 2023 (*Kelly Toys Holdings, LLC, et al. v. Zuru, LLC*, Case No. 2:2023cv09255), and a Lanham Act trademark infringement lawsuit against over 135 internet toy sellers in the Northern District of Illinois on January 5, 2024 (*Kelly Toys Holdings,*

LLC v. The Partnerships and Unincorporated Associations Identified on Schedule A, Case No. 1:2024cv00165).

64. Defendants have further asserted that Build-A-Bear's SKOOSHERZ™ plush toys infringe Defendants' claimed trade dress rights in its Squishmallows product line under Florida law, having filed a lawsuit against Build-A-Bear in Broward County, Florida, on January 29, 2024. Although nominally brought under Florida law, Defendants' Complaint against Build-A-Bear and subsequently denied *ex parte* emergency motion for preliminary injunction contain contentions not limited to injuries or activities in Florida. By their allegations in that Florida state court action, Defendants clearly contend that Build-A-Bear's SKOOSHERZ™ plush toys infringe Defendants' claimed trade dress rights in its Squishmallows product line across the United States and not just Florida, thereby directly implicating Defendants' claimed trade dress rights under the Lanham Act, 15 U.S.C. §§ 1051 *et seq.*, as Defendants have previously asserted and are currently asserting those Lanham Act trade dress rights against hundreds of defendants.

65. Defendants have also expressly stated in their Florida state court action that Defendants "**Vigilantly Protect Their Intellectual Property**", that "Kelly Toys takes steps to ensure that their intellectual property is protected," and that "Kelly Toys will stop at no length to prevent" misuse of its intellectual property. Defendants' statements of intent to enforce their claimed intellectual property rights and history of litigious conduct are indicative of an actual controversy.

66. Build-A-Bear has been actively selling and marketing its SKOOSHERZ™ plush toys across the United States starting in January 2024, and otherwise taking concrete steps to conduct activity that could constitute alleged infringement.

67. Build-A-Bear has a reasonable apprehension of suit by Defendants in view of, among other things, Defendants' history of litigious conduct in federal court under the Lanham Act with respect to their Squishmallows products, Defendants' statements of intent to enforce their claimed intellectual property rights in their Squishmallows products, Defendants' actual lawsuit against Build-A-Bear in Florida state court alleging infringement of trade dress under Florida law, and Build-A-Bear's active sale and marketing of its SKOOSHERZTM plush toys across the United States.

68. Build-A-Bear seeks specific relief through a decree of conclusive character so that Build-A-Bear can remove the cloud of Defendants' asserted trade dress infringement with respect to Build-A-Bear's SKOOSHERZTM plush toys currently being sold and marketed on a nationwide basis.

69. An actual and justiciable controversy has arisen between Build-A-Bear and Defendants regarding the validity and enforceability of Defendants' claimed rights in the Claimed Squishmallows Trade Dress under the Lanham Act, 15 U.S.C. § 1051 *et seq.*, which controversy between the parties having adverse legal interests is of sufficient immediacy and reality to warrant the issuance of a declaratory judgment in this matter.

70. Build-A-Bear is entitled to a declaratory judgment under the Lanham Act, 15 U.S.C. § 1051 *et seq.*, declaring that no features of Defendants' Claimed Squishmallows Trade Dress are valid, enforceable, or protectable because, *inter alia*: (1) the claimed trade dress is generic; (2) the claimed trade dress is not specifically articulated but instead uses terms to describe its claimed trade dress that are variable, vague, overbroad, and open-ended; (3) the claimed trade dress is not used across the entire Squishmallows product line to gain any consumer recognition as source-identifying features; (4) the claimed trade dress elements are functional; (5) the claimed

trade dress is not capable of creating a commercial impression distinct from generic, functional, and/or descriptive features; (6) Defendants cannot prove first use of the claimed trade dress; and/or (7) the claimed trade dress lacks secondary meaning in the marketplace, such that Defendants are not recognized by consumers as being the sole and exclusive source of goods bearing any or all of the claimed trade dress elements.

**COUNT II – DECLARATORY JUDGMENT OF NON-INFRINGEMENT
OF THE CLAIMED SQUISHMALLOWS TRADE DRESS**

71. Build-A-Bear incorporates by reference Paragraphs 1 through 70 as if fully set forth herein.

72. Build-A-Bear's SKOOSHERZTM plush toys do not infringe Defendants' Claimed Squishmallows Trade Dress because no features of Defendants' Claimed Squishmallows Trade Dress are valid or enforceable because, *inter alia*: (1) the claimed trade dress is generic; (2) the claimed trade dress is not specifically articulated but instead uses terms to describe its claimed trade dress that are variable, vague, overbroad, and open-ended; (3) the claimed trade dress is not used across the entire Squishmallows product line to gain any consumer recognition as source-identifying features; (4) the claimed trade dress elements are functional; (5) the claimed trade dress is not capable of creating a commercial impression distinct from generic, functional, and/or descriptive features; (6) Defendants cannot prove first use of the claimed trade dress; and/or (7) the claimed trade dress lacks secondary meaning in the marketplace, such that Defendants are not recognized by consumers as being the sole and exclusive source of goods bearing any or all of the claimed trade dress elements.

73. To the extent Defendants own any valid or enforceable trade dress rights, Build-A-Bear's SKOOSHERZTM plush toys do not create any likelihood of consumer confusion, nor are

they likely to cause mistake or deceive, or misrepresent the nature, characteristics, qualities or geographic origin of any goods and/or services.

74. An actual and justiciable controversy has arisen between Build-A-Bear and Defendants regarding Build-A-Bear's purported infringement of Defendants' Claimed Squishmallows Trade Dress under the Lanham Act, 15 U.S.C. § 1051 *et seq.*, which controversy between the parties having adverse legal interests is of sufficient immediacy and reality to warrant the issuance of a declaratory judgment in this matter.

75. Build-A-Bear has not infringed and does not infringe any valid or enforceable rights in Defendants' Claimed Squishmallows Trade Dress, and Defendants have not been and are not likely to be damaged by Build-A-Bear's conduct.

76. Build-A-Bear is entitled to a declaratory judgment under the Lanham Act, 15 U.S.C. § 1051 *et seq.*, that its manufacture, marketing, and sale of its SKOOSHERZ™ plush toys does not infringe Defendants' claimed trade dress or any of Defendants' related rights in their Squishmallows product line.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Build-A-Bear Workshop, Inc. prays for judgment as follows: (a) declaring that any and all claimed trade dress rights by Defendants in their Squishmallows products are invalid and unenforceable under the Lanham Act, 15 U.S.C. §§ 1051 *et seq.*, including specifically 15 U.S.C. §§ 1114 and 1125, and other applicable federal law; (b) declaring that Build-A-Bear's SKOOSHERZ™ plush toys do not infringe any of Defendants' claimed trade dress rights in its Squishmallows products under the Lanham Act, 15 U.S.C. §§ 1051 *et seq.*, including specifically 15 U.S.C. §§ 1114 and 1125, and other applicable federal law; (c) awarding Build-A-Bear its attorneys' fees, costs, and other expenses, including as an

exceptional case under 15 U.S.C. § 1117 and other applicable federal law; and (d) awarding Build-A-Bear such other and further relief as this Court deems just and proper under the circumstances.

JURY DEMAND

Plaintiff Build-A-Bear demands a trial by jury as to all claims and all issues so triable.

Dated: February 12, 2024

Respectfully submitted,

LEWIS RICE LLC

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***Attorneys for Plaintiff Build-A-Bear
Workshop, Inc.***

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

BUILD-A-BEAR WORKSHOP, INC,)	
)	
Plaintiff,)	
)	
vs.)	Case No. 4:24-cv-00211
)	
KELLY TOYS HOLDINGS, LLC,)	
KELLY AMUSEMENT HOLDINGS, LLC,)	
JAZWARES, LLC, and JAZPLUS, LLC.)	JURY TRIAL DEMANDED
)	
Defendants.)	

**MOTION TO ENJOIN DEFENDANTS FROM PROCEEDING WITH BAD FAITH,
LATER-FILED LAWSUIT**

COMES NOW Plaintiff Build-A-Bear Workshop, Inc. (“Plaintiff” or “Build-A-Bear”), by and through its undersigned counsel, and for its Motion to Enjoin Kelly Toys Holdings, LLC, Kelly Amusement Holdings, LLC, Jazwares, LLC, and Jazplus, LLC (collectively the “Defendants”) from Proceeding with Bad Faith, Later-Filed Lawsuit, states as follows:

1. Build-A-Bear filed its Complaint for Declaratory Judgment on February 12, 2024 at 9:59 a.m. CST, and served the same on all Defendants at 2:05 p.m. CST that same day.
2. Defendants filed a Complaint for Trade Dress Infringement Under the Lanham Act, Common Law Trade Dress Infringement, Copyright Infringement Under the Copyright Act, Common Law Unfair Competition, and California Statutory Unfair Competition against Build-A-Bear in the United States District Court for the Central District of California (the “California Lawsuit”) later on February 12, 2024 and served Build-A-Bear on February 13, 2024.
3. Pursuant to *Northwest Airlines, Inc. v. American Airlines, Inc.*, 989 F.2d 1002 (8th Cir. 1993), Defendants should be enjoined from proceeding with the California Lawsuit and this

action should proceed because, among other things, Build-A-Bear was the first to file, and Defendants have engaged in bad faith litigation tactics and blatant forum shopping.

4. Plaintiff's Memorandum in Support of this Motion to Enjoin Defendants from Proceeding with Bad Faith, Later-Filed Lawsuit is filed contemporaneously herewith and incorporated herein.

WHEREFORE, for all the foregoing reasons, and those more fully set forth in Plaintiff's Memorandum in Support, Plaintiff Build-A-Bear Workshop, Inc. respectfully requests that this Court enjoin Defendants from proceeding in the California Lawsuit in favor of this first-filed action, and grant such other and further relief as this Court deems just and proper under the circumstances.

Respectfully submitted,

Dated: February 16, 2024

LEWIS RICE LLC

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***Attorneys for Plaintiff
Build-A-Bear Workshop, Inc.***

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of February 2024, a copy of the foregoing was filed electronically. Further, I certify that a true and accurate copy of the foregoing will be served on Defendants' Registered Agent, Corporation Service Company at 251 Little Falls Drive, Wilmington, DE 19808, with a courtesy copy provided by email to:

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/s/ Michael J. Hickey

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

BUILD-A-BEAR WORKSHOP, INC.,)	
)	
Plaintiff,)	
)	
vs.)	Case No. 4:24-cv-00211-MTS
)	
KELLY TOYS HOLDINGS, LLC,)	
KELLY AMUSEMENT HOLDINGS, LLC,)	
JAZWARES, LLC, and JAZPLUS, LLC,)	
)	
Defendants.)	

**PLAINTIFF’S MEMORANDUM IN SUPPORT OF ITS MOTION TO ENJOIN
DEFENDANTS FROM PROCEEDING WITH BAD FAITH, LATER-FILED LAWSUIT**

Defendants Kelly Toys Holdings, LLC, Kelly Amusement Holdings, LLC, Jazwares, LLC, and Jazplus, LLC (collectively, “Defendants”) have engaged in coast-to-coast forum shopping relating to their purported intellectual property rights in their Squishmallows products, draining judicial resources along the way. This Court can, and should, put an end to it.

Defendants began their latest litigation campaign¹ by filing a lawsuit and seeking an “emergency,” *ex parte* temporary injunction from a Florida state court against Build-A-Bear Workshop, Inc. (“Build-A-Bear”) concerning Defendants’ asserted intellectual property rights under Florida law in their Squishmallows products (the “Florida Lawsuit”). Incredibly, Defendants provided *no notice to Build-A-Bear, and in fact, deliberately hid the lawsuit and request for injunctive relief from Build-A-Bear*. The Florida state court rightly and summarily

¹ Over the last seven years, Defendants and related entities have filed 33 lawsuits attempting to assert various intellectual property rights, including common law trade dress rights in their Squishmallows products (they have no federal trade dress registrations or applications pending), historically filing in federal court. However, it appears that Defendants chose to file their *first* lawsuit against Build-A-Bear in Florida state court due to the “unconventional” approach and relief sought (*i.e.*, a “secret” lawsuit seeking an *ex parte* injunction to stop a global retailer’s sales of products).

rejected Defendants’ underhanded request. In contrast to the initially asserted “emergency” purportedly justifying secretive, *ex parte* proceedings, Defendants thereafter allowed the Florida Lawsuit to languish. Indeed, to this day, Defendants have not served the Florida Lawsuit on Build-A-Bear or taken any further action in the Florida Lawsuit.

Build-A-Bear properly filed its Complaint in this Court seeking a declaration of its rights under federal law, after learning of the allegations made against it in the Florida Lawsuit and the apparent existence of an intellectual property dispute between the parties, and given Defendants’ uncertain intentions and failure to move forward with the Florida Lawsuit after their misguided attempt to “sneak one past the goalie” had failed. Apparently undeterred by their failed *ex parte* attack in Florida and just hours after Build-A-Bear filed its Complaint in this Court, Defendants brazenly attempted to try their luck again, this time across the country on the West Coast, by filing a parallel action against Build-A-Bear in the United States District Court for the Central District of California (the “California Lawsuit”).

Longstanding and clear Eighth Circuit law squarely prohibits the blatant forum shopping Defendants are attempting. As discussed more fully below, this action—which was filed and served before Defendants’ California Lawsuit—must proceed first, and Defendants should be enjoined from pursuing the California Lawsuit pending entry of a final judgment by this Court.

BACKGROUND

A. The Florida Lawsuit

On January 29, 2024, Defendants filed a Verified Complaint in the Circuit Court of Broward County, Florida alleging, *inter alia*, common law trade dress infringement against Build-

A-Bear for the sale of its Skoosherz™ plush toys. (See Exhibit 1.)² That same day, Defendants also filed a “Verified *Ex Parte* Emergency Motion for Temporary Injunction” in which they sought to enjoin Build-A-Bear from selling its Skoosherz™ products. (See Exhibit 2.) In support of their request for extraordinary, “emergency” relief, Defendants told the Florida state court that no notice of the proceedings or request for an injunction should be provided to Build-A-Bear (or even attempted) because such notice “may well cause Build-A-Bear to destroy . . . and/or hide evidence[.]” (*Id.*, at 28.) In a “Request for Emergency Relief” also filed that day, Defendants purported to express concern that Build-A-Bear might remove the case to federal court if it learned of the lawsuit against it. (See Exhibit 3, at 2.) Defendants also claimed they were being irreparably harmed “every day” and therefore were entitled to immediate, *ex parte* relief. (See *id.*, at 1.)

Later that same day, the Florida state court denied Defendants’ baseless assertion that an “emergency” existed in the first instance. (See Exhibit 4.) As of the filing of this Motion, Defendants have taken no further action in the Florida state court since that denial. (See Exhibit 5.)

B. This Action

After Build-A-Bear learned of the apparent existence of a dispute between the parties concerning intellectual property matters (despite Defendants’ concerted efforts to conceal it, including filing an unsuccessful motion to seal its Complaint and *Ex Parte* Emergency Motion for Temporary Injunction (see Exhibit 6)), Defendants took no action to advance the Florida Lawsuit. Build-A-Bear was therefore uncertain as to Defendants’ intentions and took the initiative to seek a comprehensive resolution of the dispute on a national basis by filing the instant action on February 12, 2024, and serving Defendants that same day. (See ECF Nos. 1, 7-10.)

² Because Build-A-Bear has never been served with the Florida Lawsuit, its access is limited to the publicly available pleadings from the court file, which bear a “Not an Official Copy – Public Access – Not an Official Copy” watermark.

Resolution of this action will refute Defendants' blatantly false allegations concerning the lawfulness of Build-A-Bear's national sales of its Skoosherz™ products, and remove any cloud Defendants have improperly put on Build-A-Bear's good name.

C. The California Lawsuit

Build-A-Bear filed the instant action on February 12, 2024 at 9:59 a.m. CST. (*See* E-Filing Receipt, Exhibit 7.) Defendants filed the California Lawsuit later that same day and, at 4:14 p.m. CST, sent each of the three undersigned counsel for Build-A-Bear an email attaching a copy of the California Lawsuit. (*See* Exhibit 8.) The California Lawsuit is largely duplicative of the instant action. In their Complaint, Defendants (who are plaintiffs in the California Lawsuit) attempt to assert claims for trade dress infringement under the Lanham Act and common law, copyright infringement under the Copyright Act, and common law and California statutory unfair competition. *See Kelly Toys Holdings, LLC, et al. v. Build-A-Bear Workshop, Inc.*, 2:24-cv-01169-JLS-MAR, ECF No. 1 (C.D. Cal.). The allegations and claims in the California Lawsuit arise out of the same facts, transactions, and occurrences as those at issue in Build-A-Bear's earlier-filed Complaint in this Court. Defendants served Build-A-Bear with the California Lawsuit on February 13, 2024. *See id.*, ECF Nos. 12-13.

ARGUMENT

Because the instant action was filed before Defendants' parallel California Lawsuit, and because the California Lawsuit itself is flagrant forum shopping designed to further harass Build-A-Bear and waste judicial resources, Defendants should be enjoined from pursuing the California Lawsuit pending issuance of a final judgment by this Court.

A. The First-to-File Rule and Injunctive Relief

Where, as here, litigation is commenced by a party after that party was named in a lawsuit and that subsequent litigation concerns substantially similar matters as the earlier-filed lawsuit, the proper remedy is the issuance of an injunction in the first-filed suit that enjoins the party from pursuing later-filed, duplicative litigation. *See Nw. Airlines, Inc. v. Am. Airlines, Inc.*, 989 F.2d 1002, 1004 (8th Cir. 1993).

Indeed, the Eighth Circuit has recognized that, “[t]he discretionary power of the federal court in which the first-filed action is pending to enjoin the parties from proceeding with a later-filed action in another federal court is firmly established.” *Id.* (collecting cases). Such injunctions are not the sort governed by the factors set forth in *Dataphase Systems Inc. v. CL Systems, Inc.*, 640 F.2d 109, 113 (8th Cir. 1981) (*en banc*). *See Nw. Airlines*, 989 F.2d at 1004. Rather, the issue “is simply whether, as between two courts both having jurisdiction over the parties and the subject matter of the dispute, the court in which jurisdiction first attached should proceed to adjudicate the controversy and should restrain the parties from proceeding with the later-filed action.” *Id.*

To this end, as the Eighth Circuit has explained, it is “well-established” that “in cases of concurrent jurisdiction, the first court in which jurisdiction attaches has priority to consider the case.” *Id.* at 1005 (quoting *United States Fire Ins. Co. v. Goodyear Tire & Rubber Co.*, 920 F.2d 487, 488-49 (8th Cir. 1990) (internal quotation omitted)). While this rule is not “rigid, mechanical, or inflexible” and should be applied “in a manner best serving the interests of justice,” the “prevailing standard is that in the absence of compelling circumstances, the first-filed rule should apply.” *Id.* (quoting *United States Fire Ins. Co.*, 920 F.2d at 488-89 (internal quotations and citation omitted)); *see also Pragmatic Software Corp. v. Antrim Design Sys., Inc.*, No. CIV. 02-2595 (JRT/FL, 2003 WL 244804, at *2 (D. Minn. Jan. 28, 2003) (recognizing that, subject to the

interests of justice, the first-to-file rule is a “relatively firm rule”); *Terra Int’l, Inc. v. Miss. Chem. Corp.*, 922 F. Supp. 1334, 1346 (N.D. Iowa 1996), *aff’d*, 119 F.3d 688 (8th Cir. 1997), *cert. denied*, 522 U.S. 1029 (Dec. 15, 1997) (“The ‘first-filed rule’ has the benefit of being a relatively firm rule that, while providing for the exceptional case, avoids in the main the need for *ad hoc* balancing of innumerable factors on a case-by-case basis and therefore is both more predictable for litigants . . . and more easily applied by the courts” (internal quotation and alteration omitted)).

Build-A-Bear filed this action before Defendants filed the California Lawsuit. Build-A-Bear also served Defendants with this action (on February 12, 2024) before Defendants served Build-A-Bear with the California Lawsuit (on February 13, 2024). Thus, this action was the first-filed action.³ And although both this action and the later-filed (and later-served) California Lawsuit were both filed and served in relatively close proximity to one another, the “rebuttable presumption that the first-filed suit should have priority” still applies. *See, e.g., Aqua-Care Mktg. LLC v. Hydro Sys., Inc.*, 99 F. Supp. 3d 959, 963–64 (S.D. Iowa 2015) (quoting *Terra Int’l*, 922 F. Supp. at 1353 n.3); *see also Barry-Wehmiller Cos., Inc. v. Marschke*, No. 4:09-CV-760 TIA, 2009 WL 3698009, at *2 (E.D. Mo. Nov. 2, 2009) (holding that the “dead heat” exception to the first-to-file rule did not apply where one suit was filed three hours and seven minutes before the second suit); *Anheuser-Busch, Inc. v. Novelis Corp.*, No. 4:06-CV-1399 RWS, 2007 WL 9805625, at *2 n.1 (E.D. Mo. Jan. 3, 2007) (“Because the Court can determine that the Ohio action was filed almost four hours before this one, the ‘dead heat’ exception to the first-filed rule does not apply.”

³ The Eighth Circuit has not clearly stated whether the first-to-file rule depends on the *filing* of the action or *service* of the action. *See, e.g., Marden’s Ark, Inc. v. UnitedHealth Grp., Inc.*, No. 19-CV-1653 (PJS/DTS), 2020 WL 13002517, at *6 n.4 (D. Minn. Aug. 20, 2020) (recognizing that “[t]here is some disagreement” on this issue (collecting cases)). Here, like in *Marden’s Ark*, the Court need not resolve this issue because, under both standards, this action was first-filed. *See id.*

(quoting *Terra Int'l*, 922 F. Supp. at 1350)); *Elec. Controlled Sys., Inc. v. Winegard Co.*, No. CV 09-2670 (MJD/AJB), 2010 WL 11497066, at *3 (D. Minn. Jan. 25, 2010) (“The Court concludes that, even though the Iowa and Minnesota actions were filed close in time, the first-filed rule still applies because the record is uncontradicted that the Iowa action was filed first.” (collecting cases)).

Further, this action and the California Lawsuit are sufficiently similar to trigger the first-to-file analysis. While “[n]o definitive standard exists to determine which cases are sufficiently overlapping or duplicative to apply the first-to-file rule[, m]any courts look to whether there is ‘substantial overlap’ between the various actions or whether the cases are ‘substantially similar.’” *Marden’s Ark, Inc.*, 2020 WL 13002517, at *7 n.5 (collecting cases) (internal citations omitted); *see also Anheuser-Busch*, 2007 WL 9805625, at *1 (“The two cases do not have to be identical but must have issues that substantially overlap.” (citing *Monsanto Tech. LLC v. Syngenta Crop Prot., Inc.*, 212 F. Supp. 2d 1101, 1103 (E.D. Mo. 2002))). As between this action and the California Lawsuit, there is more than “substantial overlap” or “substantial[] similar[ity].” Among other things: (1) the products in which Defendants assert their intellectual property rights (the Squishmallows products) are the same in both actions; (2) Build-A-Bear’s accused products (the Skoosherz™ plush toys) are the same in both cases; (3) the principal claims of infringement and validity center around Defendants’ claimed trade dress rights under the Lanham Act; and (4) the parties are identical. Indeed, the only differences are that Defendants’ later-filed California Lawsuit adds a federal copyright claim for just two of Build-A-Bear’s Skoosherz™ plush toys as well as California state law trade dress and unfair competition claims, which include overlapping issues compared to the Lanham Act claims.

As a result, absent compelling circumstances to the contrary, Defendants must be enjoined from pursuing the California Lawsuit during the pendency of this action. *See, e.g., Nw. Airlines*, 989 F.2d at 1004. As discussed below, the facts of this case do not warrant departure from the first-filed presumption, and indeed further militate in favor of the issuance of the injunction.

B. No Compelling Circumstances Warrant Departure from the First-Filed Presumption

In considering whether to depart from the first-filed presumption, the Court must examine the particular facts and circumstances for: (i) the existence of bad faith; (ii) whether a “race to the courthouse” occurred; and (iii) whether any undue burden would result from litigating in the first-filed forum. *See Nw. Airlines*, 989 F.2d at 1007. In the end, the Court must consider whether enjoining later-filed, duplicative litigation is warranted given “the spectre of duplicative efforts and costs and of inconvenience to the parties, together with the waste of judicial resources inherent in parallel litigation.” *Id.* As the parties against whom the first-to-file rule would be applied, Defendants bear “the burden of showing compelling circumstances.” *Lewis & Clark Reg’l Water Sys., Inc. v. Carstensen Contracting, Inc.*, 339 F. Supp. 3d 886, 892 (D.S.D. 2018). Defendants cannot come close to making such a showing, as the undisputed facts clearly demonstrate that *Defendants—not Build-A-Bear*—have engaged in blatant, bad-faith forum shopping.

First, Defendants engaged in bad faith litigation tactics by filing the Florida Lawsuit, in which they asserted that an “emergency” existed requiring the Florida state court to issue an *ex parte* injunction (with no notice) against Build-A-Bear, only to thereafter apparently abandon that litigation and not even serve Build-A-Bear with the Florida Lawsuit. Moreover, Defendants told the Florida state court that this matter was an “emergency” and they needed immediate injunctive relief, but subsequently filed the California Lawsuit (*after* Build-A-Bear filed this action) in which they seek only a permanent injunction, and are not even alleging the need for preliminary relief,

much less that an “emergency” exists. This kind of duplicitous conduct evidences bad faith on the part of Defendants.

Second, Build-A-Bear commenced these proceedings only after Defendants appeared to have given up on the Florida Lawsuit after their sneak attack on Build-A-Bear failed. In other words, despite their best efforts to conceal their litigation conduct, Defendants made known their belief that a dispute exists with Build-A-Bear relating to the Squishmallows products and Skoosherz™ plush toys, but took no further action to resolve that dispute after the Florida state court shut down Defendants’ covert scheme. Build-A-Bear rightly commenced these proceedings to resolve that dispute on a national basis, as the dispute did not appear likely to be resolved in the Florida state court.⁴ *See Nw. Airlines*, 989 F.2d at 1007 (explaining that plaintiff’s suit was not filed in anticipation of defendant’s lawsuit because defendant’s lawsuit “was not truly contemplated until after [plaintiff] had filed its action”). Build-A-Bear was not required to wait by idly to see whether Defendants would pursue the apparent dispute by commencing separate proceedings against Build-A-Bear elsewhere. *See, e.g., Nw. Airlines, Inc. v. Filipas*, No. CIV 07-4803 JNE/JJG, 2008 WL 1773756, at *4 (D. Minn. Apr. 15, 2008) (agreeing with Washington court’s conclusion that party who filed declaratory judgment action “was not under an obligation to sit quietly and wait for plaintiffs to make up their minds” regarding whether or not they would sue). Build-A-Bear was fully entitled to commence these proceedings, to which the later-filed California Lawsuit must yield. *See Nw. Airlines*, 989 F.2d at 1007 (affirming the district court’s

⁴ The passage of time has proven Build-A-Bear’s belief to be well-founded. Again, as of the filing of this Motion, Defendants have taken no action to pursue the Florida Lawsuit. Instead, Defendants improperly filed separate litigation in federal court—the California Lawsuit—after Build-A-Bear filed this action. As noted, the “emergency” Defendants urged the Florida state court to immediately enjoin without prior notice to Build-A-Bear has apparently subsided, as Defendants seek only permanent injunctive relief in the California Lawsuit.

conclusion that plaintiff did not act in bad faith or race to the courthouse because plaintiff brought its action to remove the chilling effect imposed by defendant's assertion that plaintiff was violating the law).

Third, it was *Defendants'* later-filed litigation—the California Lawsuit—that was reactionary, not the instant Declaratory Judgment Complaint. Defendants filed a lawsuit in Florida, in attempted secrecy, concerning this plush toy product dispute. Defendants then apparently abandoned that lawsuit once their requested relief was denied and they lost credibility with the Florida state court.⁵ Then, after Build-A-Bear commenced this action to ensure resolution of the apparent intellectual property dispute, Defendants filed the California Lawsuit. If there was any race to the courthouse, it was by Defendants, not Build-A-Bear.

Given all of the foregoing, the relevant circumstances, including the lack of any plausible undue burden that would result from Defendants litigating this matter in this forum, only reinforce application of the first-filed presumption in favor of Build-A-Bear.

CONCLUSION

For all of the foregoing reasons, Plaintiff Build-A-Bear Workshop, Inc. respectfully requests that this Court enjoin the Defendants from proceeding in the California Lawsuit in favor of this first-filed action.

⁵ In its denial (Exhibit 4) of Defendants' *ex parte* motion as not qualifying as an "emergency," the Florida state court cited its own Administrative Order regarding civil emergency matters (Administrative Order 2021-50-CIV) (*available at* <https://www.17th.flcourts.org/wp-content/uploads/2021/09/2021-50-Civ.pdf>), which in turn states that "an attorney or party who seeks 'emergency' review loses credibility when the court determines there is no true emergency." (citing *USAA Cas. Ins. Co. v. Pembroke Pines MRI, Inc.*, 24 So. 3d 588 (Fla. 4th DCA 2009)).

Respectfully submitted,

Dated: February 16, 2024

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EXHIBIT O

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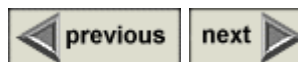
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Title: SQUISHMALLOW FROG.

Description: Electronic file (eService)

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Date of Creation: 2017

Date of Publication: 2017-01-02

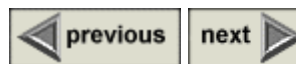
Nation of First Publication: Hong Kong

Authorship on Application: Kellytoy Worldwide, Inc., employer for hire; Citizenship: United States. Authorship: sculpture.

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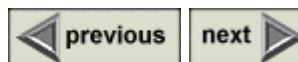
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Application Title: Axolotl Archie.

Title: Axolotl Archie.

Description: Electronic file (eService)

Copyright Claimant: Kelly Toys Holdings, LLC. Address: 4811 South Alameda Street, Los Angeles, CA, 90058, United States.

Date of Creation: 2019

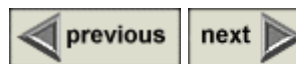
Date of Publication: 2020-09-28

Nation of First Publication: United States

Authorship on Application: Kelly Toys Holdings, LLC, employer for hire; Domicile: United States; Citizenship: United States. Authorship: sculpture.

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Names: [Kelly Toys Holdings, LLC](#)



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